

EXHIBIT 1

From: [Corey Johanningmeier](#)
To: [Engelmann, Holly E.](#); [BDIP_Ramot](#); [amayo@ashbygeddes.com](#)
Cc: [CiscoRamot](#); [jying@morrisnichols.com](#)
Subject: RE: Cisco/Ramot (DDE) | ROG correction
Date: Tuesday, September 12, 2023 1:43:56 PM

Holly, as I previously explained to you and to Matt, when I asked that we spread this discovery over a longer period of time, my team is in trial this month, there are other conflicts, and Cisco's productions and interrogatory responses are deficient. You represented that you were amenable to a reasonable extension into mid-November, subject to your client's input. Then you spoke to your client and now you are suggesting double-tracking depositions and running against the arbitrary deadline. I am disappointed that Cisco has chosen to repeat this tactic.

I will look at these designations in view of Cisco's responses and confirm any that I can, but I am concerned with the unfairness and inefficiency of scheduling depositions under Cisco's incomplete discovery record. There are also severe practical difficulties that would be easily remediated with more time.

Just to give an example relevant to your designation with respect to [REDACTED], Cisco's Interrogatory Responses do not even identify the [REDACTED]. Cisco has not produced information in its possession about these DSP chips, and Cisco has not provided and information about the firmware configuration of these DSP chips in its modules, nor any indication that it intends to do so. In fact, I learned that you represented to [REDACTED] that simply agreeing to reuse of materials from the EDTex litigation would be sufficient to satisfy Cisco's duplication of our subpoena. It is clearly not enough to meet our reasonable and longstanding discovery requests. We require full responses and production of material concerning these DSP chips from Cisco, in order to inform [REDACTED] what else they need to provide, and this must occur before we take depositions. I note that our Motion to Compel in Texas in **July of 2020** sought "configuration files, or configuration software for the modules and/or their components," as did our Feb. 15, 2023 Requests for Production here.

As I mentioned, I am compiling a list of such deficiencies. Also, you did not answer my last inquiry about use of Rule 30(b)(1) testimony from the prior case. I propose that you review the letter I will send you later today, and we set a time tomorrow or Thursday to have a phone conversation. Please let me know what times might work.

-- Corey

From: Engelmann, Holly E. <HEngelmann@duanemorris.com>
Sent: Tuesday, September 12, 2023 10:16 AM
To: Corey Johanningmeier <cjohanningmeier@bdiplaw.com>; BDIP_Ramot <bdiplaw.com>; amayo@ashbygeddes.com
Cc: CiscoRamot <CiscoRamot@duanemorris.com>; jying@morrisnichols.com
Subject: RE: Cisco/Ramot (DDE) | ROG correction

[EXTERNAL]

Hi Corey,

We offer [REDACTED] in his individual capacity and as Cisco and Acacia's designee for Cisco Topics 1-3 [REDACTED] 4-5, 6 [REDACTED] 8, 40 and Acacia Topic 6 on September 21 with a 10:00 am CDT start time.

As with the others, please confirm as soon as possible so we can lock down the logistics.

Thanks,
Holly

HOLLY ENGELMANN, P.C. | Duane Morris LLP

From: Engelmann, Holly E.

Sent: Tuesday, September 12, 2023 9:55 AM

To: Corey Johanningmeier <cjohanningmeier@bdiplaw.com>; BDIP_Ramot <bdip_ramot@bdiplaw.com>; amayo@ashbygeddes.com

Cc: CiscoRamot <CiscoRamot@duanemorris.com>; jying@morrisnichols.com

Subject: RE: Cisco/Ramot (DDE) | ROG correction

Good morning Corey,

Ramot served six 30(b)(1) notices and a 30(b)(6). To that end, we offer the following witnesses who will be sitting once for both their individual and corporate depositions.

- 9/21 11:00 CDT start - [REDACTED] will be Cisco and Acacia's designee for Cisco Topics 22, 23, and 26 and Acacia Topic 24.
- 9/26 8:30 CDT start - [REDACTED] will be Acacia's designee for Acacia Topics 15, 18, 20.
- 9/28 8:30 CDT start - [REDACTED] will be Acacia's designee for Acacia Topics 1-5, 6 (related to [REDACTED]), 7, 8-9, and 35.
- 10/4 12:00 CDT start - [REDACTED] will be Cisco and Acacia's designee for Cisco Topics 1-3, 7, 12, 14, and 19 and Acacia Topics 12 and 14.

I will follow-up this week with dates for [REDACTED]. We will hold [REDACTED] until after the depositions to see if Ramot still needs a deposition. With these dates, we believe only a one-week extension until October 6 is warranted.

Please let us know if Ramot will be taking these deposition via remote means and confirm as soon as you can so that the witnesses can confirm their schedules.

Please also provide dates for Ramot's witnesses.

Thanks,
Holly

HOLLY ENGELMANN, P.C. | Duane Morris LLP

From: Engelmann, Holly E.

Sent: Monday, September 11, 2023 9:53 AM

To: Corey Johanningmeier <cjohanningmeier@bdiplaw.com>; BDIP_Ramot

<bdip_ramot@bdiplaw.com>; amayo@ashbygeddes.com

Cc: CiscoRamot <CiscoRamot@duanemorris.com>; jying@morrisnichols.com

Subject: Cisco/Ramot (DDE) | ROG correction

Good morning Corey,

I hope you had a restful weekend!

In preparing for the depositions Ramot noticed, it came to our attention that there is a typo in our response to ROG 10. Please note that Acacia-Ramot_00000105 should be Acacia-Ramot_00000102. We will serve amended responses, but didn't want to delay in getting you this information.

Thanks,
Holly

HOLLY ENGELMANN, P.C. | Duane Morris LLP

214.257.7226 (office) | 214.228.1870 (cell)

hengelmanna@duanemorris.com | www.duanemorris.com

For more information about Duane Morris, please visit <http://www.DuaneMorris.com>

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EXHIBIT 2

From: [Corey Johanningmeier](#)
To: [Engelmann, Holly E.](#); [Gaudet, Matthew C.](#)
Subject: RE: Cisco v Ramot (Delaware Cases) - Service of Rule 30(b)(1) Deposition Notices
Date: Friday, September 1, 2023 4:36:51 PM
Attachments: [image001.png](#)

Yes, no new serving of discovery, just more time to complete the discovery already served, and to work out what either side thinks is missing from productions/responses already served.

-- Corey

From: Engelmann, Holly E. <HEngelmann@duanemorris.com>
Sent: Friday, September 1, 2023 1:21 PM
To: Corey Johanningmeier <cjohanningmeier@bdiplaw.com>; Gaudet, Matthew C. <MCGaudet@duanemorris.com>
Subject: RE: Cisco v Ramot (Delaware Cases) - Service of Rule 30(b)(1) Deposition Notices

[EXTERNAL]

Hi Corey,

I'm sorry, we should have made time for a call. Thank you for sending this and we tend to agree. Before taking to our client, can you confirm that the agreement is based on discovery already served and no new discovery can be served no matter how long we push the date out?

Holly

HOLLY ENGELMANN, P.C. | Duane Morris LLP

From: Corey Johanningmeier <cjohanningmeier@bdiplaw.com>
Sent: Friday, September 1, 2023 3:15 PM
To: Gaudet, Matthew C. <MCGaudet@duanemorris.com>; Engelmann, Holly E. <HEngelmann@duanemorris.com>
Subject: FW: Cisco v Ramot (Delaware Cases) - Service of Rule 30(b)(1) Deposition Notices

Matt and Holly,

I was going to raise this if we had a call this week but we didn't, so:

Before we spend too much more time trying to arrange witnesses during a difficult time of the year to do so, it seems to me we're in a unique situation, up against a deadline for the close of discovery which will be immediately followed by a stay of unknown duration. I understand the value of a deadline in making things happen, and would like to get this discovery finished this year. But the amount of stuff both parties need to get done before the 29th seems potentially unworkable, and certainly painful. I assume you all also have other commitments this month.

Can we just agree to a more reasonable time frame to get this discovery done? Please let me know your thoughts,

Regards, and have a good weekend!

-- Corey

From: Corey Johanningmeier <cjohanningmeier@bdiplaw.com>
Sent: Friday, September 1, 2023 12:15 PM
To: Engelmann, Holly E. <HEngelmann@duanemorris.com>; Gaudet, Matthew C. <MCGaudet@duanemorris.com>
Cc: BDIP_Ramot <bdip_ramot@bdiplaw.com>; Mayo, Andrew C. <AMayo@ashbygeddes.com>; Ying, Jennifer <jying@morrisnichols.com>; CiscoRamot <CiscoRamot@duanemorris.com>
Subject: RE: Cisco v Ramot (Delaware Cases) - Service of Rule 30(b)(1) Deposition Notices

I had asked to get on the phone to discuss this, and deposition scheduling generally, but we can also email:

With respect to 30(b)(6) testimony, I think that comes in as party admissions even if we don't stipulate. But we can come up with a stipulation as to how that is to be used, and whether and to what extent it can be objected to, with the goal of making our pre-trial period more efficient.

But it seems maybe you are thinking of non-party testimony. With respect to the inventors for instance, they were not parties or employees. I believe we agreed you needn't subpoena them, but we didn't designate their testimony. Both sides took quite a bit of 30(b)(1) testimony, including some from party designees on subjects outside of what they were designated for. Is that the testimony you are wanting to stipulate about?

Concerning [REDACTED], he was included in your supplemental disclosures, and appears from public information to have potentially unique knowledge about the marketing and benefits of key coherent optics and platform products in this case. I am amenable to scheduling his deposition after Cisco's 30(b)(6) designees, if you wish to have someone else testify for Cisco about those products, but can't agree *before* those party depositions that his individual testimony would not be needed.

Best regards,

-- Corey

From: Engelmann, Holly E. <HEngelmann@duanemorris.com>
Sent: Friday, September 1, 2023 10:19 AM
To: Corey Johanningmeier <cjohanningmeier@bdiplaw.com>; Gaudet, Matthew C. <MCGaudet@duanemorris.com>
Cc: BDIP_Ramot <bdip_ramot@bdiplaw.com>; Mayo, Andrew C. <AMayo@ashbygeddes.com>; Ying, Jennifer <jying@morrisnichols.com>; CiscoRamot <CiscoRamot@duanemorris.com>
Subject: RE: Cisco v Ramot (Delaware Cases) - Service of Rule 30(b)(1) Deposition Notices

[EXTERNAL]

Hi Corey,

Following up on the email below. It would be helpful to know if we have an agreement as we are trying to find dates to propose for the depositions. Scheduling less than full days will be easier.

Thanks,
Holly

HOLLY ENGELMANN, P.C. | Duane Morris LLP

From: Engelmann, Holly E.

Sent: Tuesday, August 29, 2023 3:12 PM

To: Corey Johanningmeier <cjohanningmeier@bdiplaw.com>; Gaudet, Matthew C. <MCGaudet@duanemorris.com>

Cc: BDIP_Ramot <bdip_ramot@bdiplaw.com>; Mayo, Andrew C. <AMayo@ashbygeddes.com>; Ying, Jennifer <jying@morrisnichols.com>; CiscoRamot <CiscoRamot@duanemorris.com>

Subject: RE: Cisco v Ramot (Delaware Cases) - Service of Rule 30(b)(1) Deposition Notices

Hi Corey,

Emailing about the deposition notices served by the parties.

Would Ramot be willing to enter a stipulation that the party depositions taken in the EDTX case are deemed as if taken in the Delaware cases? This would down on the scope of what the parties are seeking through their respective notices. If Ramot will so stipulate, we will agree to take no more than half a day with each of the inventors. Please let us know if we have an agreement so that we can work on identifying for you topics/witnesses/dates.

Also, Ramot noticed [REDACTED], presumably because he was identified in Cisco/Acacia's initial disclosures. As we have digested Ramot's 30(b)(6) notice and what [REDACTED] would testify about generally, we want to inform you that we do not believe he has any unique, non-duplicative information than the other individuals Ramot has sent individual deposition notices for and/or the witnesses Cisco/Acacia will designate as corporate witnesses. We also confirm that we do not intend to call [REDACTED] at trial and if for some unforeseen reason he is, then we would make him available before trial. In an effort to streamline discovery and narrow where we can we disclose this to see if Ramot will withdraw [REDACTED] deposition notice.

Thanks,
Holly

HOLLY ENGELMANN, P.C. | Duane Morris LLP

From: Corey Johanningmeier <cjohanningmeier@bdiplaw.com>

Sent: Thursday, August 24, 2023 9:47 PM

To: Engelmann, Holly E. <HEngelmann@duanemorris.com>; Gaudet, Matthew C. <MCGaudet@duanemorris.com>

Cc: BDIP_Ramot <bdip_ramot@bdiplaw.com>; Mayo, Andrew C. <AMayo@ashbygeddes.com>; Ying, Jennifer <jying@morrisnichols.com>; CiscoRamot <CiscoRamot@duanemorris.com>

Subject: Cisco v Ramot (Delaware Cases) - Service of Rule 30(b)(1) Deposition Notices

Counsel,

Attached for service please find Ramot's notices of Rule 30(b)(1) deposition of [REDACTED]
[REDACTED]

At some convenient point in the near future, we should confer to discuss 1) how to efficiently use prior relevant testimony from the Texas matter to the extent issues or products overlap, and 2) organizing and scheduling of remaining discovery. Please let me know times you might be available for a discussion.

Best regards,

-- Corey



Corey Johanningmeier

Partner

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EXHIBIT 3

From: [Corey Johanningmeier](#)
To: [Engelmann, Holly E.](#)
Cc: [Powers, Joseph A.](#); [jying@morrisnichols.com](#); [Gaudet, Matthew C.](#); [Saleem, Sajid](#); [Grant, Jayla C.](#); [Mayo, Andrew C.](#); [Denise De Mory](#)
Subject: RE: Cisco/Ramot | schedule
Date: Monday, March 11, 2024 4:37:03 PM

To schedule the number of witnesses noticed or designated, in view of the fact that we, and doubtless you all, have other cases taking up schedule space, I think we need **at least** the month of April.

I think that whether we need more time depends somewhat on when and if you update your discovery. It has been five months since we last exchanged letters, but let me attempt a summary of the things that I think are both key and outstanding – that is, stuff we either need to get before we can take a complete deposition of technical witnesses, or intend to move to compel on if we are not going to get it soon:

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]

By listing these issues, I am not representing that these are the only issues, but merely trying to move forward as efficiently as possible. Please let me know when you expect to provide the information long requested. I am happy to have a meet and confer call to discuss.

-- Corey

From: Engelmann, Holly E. <HEngelmann@duanemorris.com>

Sent: Friday, March 8, 2024 11:47 AM

To: Corey Johanningmeier <cjohanningmeier@bdiplaw.com>

Cc: Powers, Joseph A. <JAPowers@duanemorris.com>; jying@morrisnichols.com; Gaudet, Matthew C. <MCGaudet@duanemorris.com>; Saleem, Sajid <SSaleem@duanemorris.com>; Grant, Jayla C. <JCGrant@duanemorris.com>

Subject: Cisco/Ramot | schedule

[EXTERNAL]

Hi Corey,

I believe that during your call yesterday there was discussion about extending the discovery schedule. Do you have a proposed date that you'd like to move the March 29 deadline to?

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EXHIBIT 4

EXHIBIT A — TO RAMOT AT TEL AVIV UNIVERSITY LTD.’S
FINAL INFRINGEMENT CONTENTIONS:
ACCUSED PRODUCTS

Ramot is currently aware of the following Cisco products that Cisco and its subsidiary Acacia makes, uses, sells, offers to sell and/or imports that infringe the Asserted Claims of the Asserted Patents. All accused products identified in this exhibit are collectively the “Accused Instrumentalities” or “Accused Products.” Accused Products identified as infringing claims of the ’998 Patent or ’872 Patent are shown in the respective claim charts at Exhibits B and C, and may also be collectively referred to as the “’998 Accused Products” or “’872 Accused Products.” Ramot reserves the right to amend this list and add additional products upon further investigation or discovery.

Cisco’s “**Acacia Accused Products**” include, but are not limited to:

- 100 Gbps pluggable CFP-DCO modules;
- 200 and 400 Gbps, and tunable bandwidth, pluggable CFP2-DCO modules;
- 1.2T (AC1200) and 400G (AC400) embedded modules;
- CIM8 pluggable modules;
- 400 Gbps OSFP and QSFP-DD pluggable modules;
- 800 Gbps OSFP and QSFP-DD ZR/OpenZR+ pluggable modules; and
- 100 Gbps ZR/OpenZR+ pluggable modules.

And other modules that include similar functionality, such as by including one of Acacia’s DSP chips. Cisco’s Acacia Accused Products also include Acacia-developed CFP2-ACO modules to the extent they are used with an Acacia- or Cisco-developed DSP ASIC on a linecard.

Cisco’s “**Acacia Accused Products**” are further detailed in the Product ID (PID) chart below.

Cisco's **Cisco Accused Products** include infringing transceiver modules and associated DSP functionality that support advanced mapping and modulation techniques, including without limitation Quadrature Modulation (*e.g.*, 16-QAM) and Pulse Amplitude Modulation (*e.g.*, PAM4), and include modules that operate at speeds at or above 50 Gbps per optical or electrical lane. The Cisco Accused Products include Acacia Accused Products sold by Cisco under Cisco Product IDs, and also include, but are not limited to:

50 Gbs SFP56 Pluggable modules

100 Gbps "single lambda" modules

100G or 400G "BiDi" modules

200 Gbps QSFP and QSFP-DD pluggable modules;

400 Gbps QSFP-DD pluggable modules;

800 Gbps QSFP-DD pluggable modules;

And other modules that include similar functionality, along with the associated digital signal processing functionality, whether implemented in the module itself or in an associated circuit or processor on the line card or fixed chassis. Cisco's Cisco Accused Products also include CFP2-ACO modules to the extent they are used with an Acacia- or Cisco-developed DSP ASIC on a linecard.

Cisco and Acacia are also accused of directly infringing via their reference and test designs, and indirectly infringing by inducing or contributing to their customer's designs—that implement one of Cisco's Acacia-developed Sky, Denali, Meru, Pico, Greylock, Jannu, or Delphi DSP ASICs coupled together with one of Cisco's Acacia-developed Silicon Photonic ICs.

Cisco's **Cisco Accused Products** also include certain line cards for its routers, switches, and optical transport systems—that contain an embedded transceiver, that contain embedded TX

DSP functionality that participates in infringement, or that necessarily require one or more accused transceiver modules, such as a CFP2 DCO, CIM8, or 400G-ZR pluggable transceiver used as a “trunk” port module, to operate in the applications for which they are intended and sold. This category, listed in the chart below under “Line Cards:” also includes certain modular port adapter cards that are sold in order to adapt and use accused pluggable modules with Cisco’s router products.

Cisco’s “**Cisco Accused Products**” are further detailed in the Product ID (PID) chart below.

Specific model names and numbers known (based on publicly available and discovered sources) to be used by Cisco and Acacia for these products are listed below, without limitation. Acacia and Cisco part numbers have been included for identification purposes. To the extent that the same product has been previously orderable from Cisco with a different product ID—or a product ID with additional characters such as = to denote spares—those products are also accused. To the extent that the same product is also sold as part of a “bundle” or with associated licenses to enable accused functionality—which each may have its own separate Cisco product ID—those bundle and license sales are also accused.

On information and belief, other model names and numbers that operate in the manner and according to the industry specifications described above exist and are used, offered, sampled, and sold. Such instrumentalities are included within the Accused Products. Cisco maintains a searchable “Transceiver Module Group (TMG) Compatibility Matrix” at <https://tmgmatrix.cisco.com/>, which contains additional information associating certain transceiver modules identified herein with compatible Cisco Routers, Switches, and Optical Transport systems that employ them.

Category	Sub-category	Item	Value	Unit	Notes
A	A1	A1.1	100	kg	
		A1.2	200	kg	
		A1.3	300	kg	
		A1.4	400	kg	
		A1.5	500	kg	
	A2	A2.1	600	kg	
		A2.2	700	kg	
		A2.3	800	kg	
		A2.4	900	kg	
		A2.5	1000	kg	
B	B1	B1.1	1100	kg	
		B1.2	1200	kg	
		B1.3	1300	kg	
		B1.4	1400	kg	
		B1.5	1500	kg	
	B2	B2.1	1600	kg	
		B2.2	1700	kg	
		B2.3	1800	kg	
		B2.4	1900	kg	
		B2.5	2000	kg	
C	C1	C1.1	2100	kg	
		C1.2	2200	kg	
		C1.3	2300	kg	
		C1.4	2400	kg	
		C1.5	2500	kg	
	C2	C2.1	2600	kg	
		C2.2	2700	kg	
		C2.3	2800	kg	
		C2.4	2900	kg	
		C2.5	3000	kg	
D	D1	D1.1	3100	kg	
		D1.2	3200	kg	
		D1.3	3300	kg	
		D1.4	3400	kg	
		D1.5	3500	kg	
	D2	D2.1	3600	kg	
		D2.2	3700	kg	
		D2.3	3800	kg	
		D2.4	3900	kg	
		D2.5	4000	kg	
E	E1	E1.1	4100	kg	
		E1.2	4200	kg	
		E1.3	4300	kg	
		E1.4	4400	kg	
		E1.5	4500	kg	
	E2	E2.1	4600	kg	
		E2.2	4700	kg	
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		E2.4	4900	kg	
		E2.5	5000	kg	

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[REDACTED]					
[REDACTED]	[REDACTED]			[REDACTED]	[REDACTED]
			[REDACTED]		
[REDACTED]		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
		[REDACTED]	[REDACTED]		
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]			[REDACTED]	[REDACTED]
		[REDACTED]	[REDACTED]		[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]		[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

II. PRODUCTS TIED TO SALES OF ACCUSED PRODUCTS

Cisco's product line also includes certain line cards for its routers, and switches—whether those cards are sold separately as part of a Modular system (*e.g.*, 9000 Series and 8800 Routers, Nexus 9800 Series switches), are integrated and sold together with other components of a Fixed Chassis system (*e.g.*, 8100, 8200, and 8700 Routers), or are themselves the substantially complete functional instrumentality of a complete system (*e.g.*, certain Nexus 3000 Series or Nexus 9300 Series GX and GX2 switches)—which are uniquely adapted to be used with, marketed and sold together or bundled with, and/or only functional for their designed and marketed purpose with inclusion of, accused transceiver modules. For example, Cisco markets and sells series of 400G and 800G data center switches, models of which consist substantially or entirely of ports for pluggable, accused 400G and 800G optical transceiver modules. See, *e.g.*, <https://www.cisco.com/site/us/en/products/networking/cloud-networking-switches/400g-switches/index.html>. For instance, at least the following 400G and 800G switch products are not operational as designed and marketed without at least one accused QSFP-DD 400G or 800G transceiver module: Cisco Nexus 9800 line card N9K-X9836DM-A; Cisco Nexus 9300 400G switches (9364D-GX2A, 9348D-GX2A, 9332D-GX2B, N9K-C9332D-H2R); Cisco Nexus 9300 800G switches (N9364E-SG2-O, N9364E-SG2-Q); and Cisco Nexus 9400 400G switches (N3K-C3432D-S, N3K-C3408-S with NXM-X4D expansion module).

Cisco derives revenue from sales of these products that is bundled with, tied to, convoyed with, or otherwise dependent on the existence and sales of Cisco Accused Products. In addition, Cisco sells licenses for these router line cards and switches (for example per 100G of bandwidth) that are directly tied to use of accused transceiver modules in their ports.

Revenue from all of these product sales is accused and relevant to determining the benefit, and reasonable royalty, that Cisco receives from its marketing and sales of Accused Products. A partial list of these tied products is given below:

- ASR 9000 Series Routers
 - ASR 9900 Series 5th Generation 10-Port 400 Gigabit Ethernet Line Card: (A99-4T-FC and A99-10X400GE-X-)
 - ASR 9900 Series 5th Generation 32-Port 100 Gigabit Ethernet Line Card: (A99-32HG-FC and A99-32X100GE-X-)
 - ASR 9000 Series 5th Generation High-Density Multi-Rate Line Cards: 2 Terabit and 0.8 Terabit Cards: (A9K-20HG-FLEX-FC, A9K-20HG-FLEX- and A9K-8HG-FLEX-FC, A9K-8HG-FLEX-)
 - ASR 9000 Series 5th Generation 400 Gigabit Ethernet Multi-Rate Line Card: (A9K-4HG-FLEX-FC, A9K-4HG-FLEX-, and A99-4HG-FLEX-FC, A99-4HG-FLEX-)
 - ASR 9000 Series 16-Port 100 Gigabit Ethernet Packet Transport Line Card: (A9K-16X100GE-FC and A9K-16X100GE-TR)
 - ASR 9900 Series 16-Port 100 Gigabit Ethernet Service Edge Line Card: (A99-16X100GE-X-FC and A99-16X100GE-X-SE)
 - ASR 9000 Series 32-Port 100 Gigabit Ethernet Line Card: (A99-32X100GE-FC and A99-32X100GE-TR)
 - ASR 9000 Series 12-Port 100-Gigabit Ethernet Line Cards: (A99-12X100GE-FC and A99-12X100GE)
 - ASR 9900 Series 8-Port 100 Gigabit Ethernet Line Cards with 7-Fabric Support: (A99-8X100GE-FC and A99-8X100GE-)
 - ASR 9000 Series 8-Port 100-Gigabit Ethernet LAN Line Card: (A9K-8X100GE-FC and A9K-8X100GE-)
 - ASR 9000 Series 4-Port 100-Gigabit Ethernet LAN Line Card: (A9K-400GE-LAN-FC and A9K-4X100GE)
- Cisco 8000 Series Routers
 - 8700 Series Fixed Chassis Routers: (8711-32FH-M)

- 8100 Series Fixed Chassis Routers: (8101-32H, 8102-64H, 8101-32FH, 8111-32EH, 8122-64EH, 8101-32H-O, 8102-64H-O, 8101-32FH-O, 8111-32EH-O, 8122-64EH-O)
- 8200 Series Fixed Chassis Routers: (8201-SYS, 8202-SYS, 8201-24H8FH, 8201-32FH, 8202-32FH-M, 8201-32FH-O)
- 8800 48x100GbE QSFP28 Line Card: (8800-LC-48H)
- 8800 34x100GbE QSFP28 and 14x400GbE QSFP56-DD Line Card: (88-LC0-34H14FH)
- 8800 36x400GbE QSFP56-DD Line Card: (8800-LC-36FH and 88-LC0-36FH)
- 8800 36x400GbE QSFP56-DD Line Card with MACsec (88-LC0-36FH-M)
- 8800 36x800GbE QSFP-DD800 Line Card: (88-LC1-36EH)
- NCS 5700 Series Line Cards and Fixed Chassis Routers
 - NCS 5700 Series 400GE and 100GE Line Cards: (NC-57-24DD or NC57-24X400G-BA; NC-57-18DD-SE or NC57-18D12TH-SB; NC-57-36H-SE or NC57-36H-SB; NC-57-36H6D-S or NC57-36H6D-BM)
 - NCS 5700 Series Line Cards with 400GE Ports: (NC-57-48Q2D-S, NC-57-48Q2D-SE-S, NC57-48Q2D-SM, and NC57-48Q2D-BM)
 - NCS-57B1 Fixed Chassis: (NCS-57B1-6D24-SYS and NCS-57B1-5DSE-SYS)
 - NCS-57C1 Fixed Chassis: (NCS-57C1-48Q6-SYS)
 - NCS-57C3 Fixed Chassis: (NCS-57C3-MOD-SYS and NCS-57C3-MODS-SYS)
 - NCS-57D2-18DD Fixed Chassis: (NCS-57D2-18DD-S and NCS-57D2-18DD-SYS)
- NCS 5500 Series Modular Chassis, including NCS 5508 and NCS 5516
 - 24 Ports 100GE and 12 Ports 40GE Base Line Card: (NC55-24H12F-SE or NC55-24H12F-SB, NC55-24H12F-BA)
 - 24X100G High Scale Modular Line Card: (NC55-24X100G-SE or NC55-24X100G-SB)
 - 18-Port 100GE and 18-Port 40GE Base Line Card: (NC55-18H18F or NC55-18H18F-BA)
 - 36X100G Base Modular Line Cards (NC55-36X100G or NC55-36X100G-BA)

- 36X100G MACsec Modular Line Cards: (NC55-36X100G-S or NC55-36X100G-BM)
 - 36X100G High Scale Modular Line Cards (NC55-36X100G-A-SE)
- NCS 5500 Series Fixed Chassis Routers
 - NCS 5501 System: (NCS-5501 and NCS-5501-SE)
 - NCS 5502 System: (NCS-5502 and NCS-5502-SE)
 - NCS 55A1 System: (NCS-55A1-36H-SE-S and NCS-55A1-36H-SE-S)
 - NCS 5500 Dense 25G Fixed Chassis: (NCS-55A1-48Q6H)
 - NCS-55A1-24Q6H Fixed Chassis: (NCS-55A1-24Q6H-S and NCS-55A1-24Q6H-SS)
- NCS 500 Series Routers, including NCS 560
 - NCS 560 Series Router Interface Modules with 100/200G: (N560-IMA-2C, N560-IMA-1W, N560-IMA-2C-DD)
 - NCS 540 Large Density Router: (N540-24Q8L2DD-SYS)
- Catalyst 9600 Series Switches with 400G and 100G Ethernet Line Cards
 - Catalyst 9600 Series Combo Line Cards: (C9600-LC-40YL4CD and C9600X-LC-32CD)
- Catalyst 9500X and 9500 Series Switches with 100G and 400G Ethernet ports
 - C9500X-28C8D
 - C9500-32C, C9500-32QC, C9500-48Y4C, C9500-24Y4C
- Nexus 9800 Series Switches with 400G Ethernet Line Cards
 - Nexus 9800 36-port 400G line card with MACsec: (N9K-X9836DM-A)
 - Nexus 9800 14-port 400G and 34 port 100G line card: (N9K-X98900CD-A)
- Nexus 9500 Series Switches with 400G and 100G Ethernet Line Cards
 - 400-Gigabit Ethernet Line Card: (N9K-X9716D-GX and N9K-X9624D-R2)
 - 100-Gbps Line Cards: (N9K-X9736C-FX, N9K-X9736C-EX, N9K-X9732C-FX, N9K-X9732C-EX, N9K-X9636C-RX, N9K-X9636C-R, and N9K-X9432C-S)
- Nexus 9400 Series Switches with 400G and 200G Ethernet Line Cards

- Nexus 9400 8p 400G QSFP-DD LEM: (N9K-X9400-8D)
 - Nexus 9400 16p 200G LEM: (N9K-X9400-16W)
- Nexus 9300 Series Switches with 800/400/200/100G Interfaces
 - Nexus 9300 Series 800G Switches: (N9364E-SG2-O, N9364E-SG2-O=, N9364E-SG2-Q, N9364E-SG2-Q=)
 - Nexus 9300-GX Series 400G Switches: (N9K-C9316D-GX, N9K-C93600CD-GX, and N9K-C9364C-GX, N9K-C9332D-H2R)
 - Nexus 9300-GX2 Series 400G Switches: (N9K-C9364D-GX2A, N9K-C9348D-GX2A, and N9K-C9332D-GX2B)
 - Nexus 9300-FX Series Switches: (N9K-C93180YC-FX, N9K-C93108TC-FX, and N9K-C9348GC-FXP)
 - Nexus 9300-FX2 Series Switches: (N9K-C9336C-FX2, N9K-C9336C-FX2-E, N9K-C93240YC-FX2, N9K-C93360YC-FX2, and N9K-C93216TC-FX2)
 - Nexus 9300-FX3 Series Switches: (N9K-C93180YC-FX3)
 - Nexus 9300-FX3S Series Switch: (N9K-C93180YC-FX3S)
 - Nexus 93108TC-FX3P Switch: (N9K-C93108TC-FX3P)
 - Nexus 9332C and 9364C Fixed Spine Switches: (N9K-C9364C and N9K-C9332C)
 - Nexus 9300-EX Series Switches: (N9K-C93180YC-EX, N9K-C93108TC-EX, and N9K-C93180LC-EX)
 - Nexus 9300-EX and FX 24 Port Series Switches: (N9K-C93180YC-FX-24, N9K-C93108TC-FX-24, N9K-C93180YC-EX-24, and N9K-C93108TC-EX-24)
- Nexus 9200 Series Platform Switches with QSFP28 ports for 100G Ethernet Modules
 - N9K-92348GC-X
 - N9K-92160YC-X
 - N9K-92300YC
 - N9K-92304QC
 - N9K-9236C
- Nexus 7000 Series Switches with 100G Ethernet Line Cards

- Nexus 7700 F4-Series 30-Port 100-Gigabit Ethernet Module: (N77-F430CQ-36)
- Nexus 7700 F3-Series 12-Port 100 Gigabit Ethernet Module: (N77-F312CK-26)
- Nexus 7700 M3-Series 100 Gigabit Ethernet Module: (N77-M312CQ-26L)
- Nexus 7000 F3-Series 6-Port 100 Gigabit Ethernet Module: (N7K-F306CK-25)
- Nexus 3000 Series Switches with QSFP-DD ports for 400G Ethernet modules and QSFP28 ports for 100G Ethernet modules
 - Nexus 3432D-S 400G Switch: (N3K-C3432D-S)
 - Nexus 3408-S 400G Switch (N3K-C3408-S) with: Nexus 100G Line Expansion Module (NXM-X16C) or Nexus 400G Line Expansion Module (NXM-X4D)
 - Nexus 3600 Series Switches: (N3K-C3636C-R, N3K-C36180YC-R)
 - Nexus 3400 Series Switches: (N3K-C34180YC, N3K-C3464C)
 - Nexus 3200 Series Switches: (N3K-C3264C-E, N3K-C3232C)
 - Nexus 3100-Z Series Switches: (N3K-C3132C-Z)
 - Nexus 3100-V Series Switches: (N3K-C31108PC-V, N3K-C31108TC-V, and N3K-C31108TCV-32T)

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BIODELIVERY SCIENCES)
INTERNATIONAL, INC. and ARIUS)
TWO, INC.,)

Plaintiffs,)

v.)

Civil Action No. 19-444-CFC-CJB

CHEMO RESEARCH, S.L., INSUD)
PHARMA S.L.U., INTELGENX CORP.)
and INTELGENX TECHNOLOGIES)
CORP.,)

Defendants.)

MEMORANDUM ORDER

At Wilmington, Delaware this **20th day of February, 2020.**

WHEREAS, Defendants Chemo Research, S.L., Insud Pharma S.L.U., IntelGenX Corp. and IntelGenX Technologies Corp. (“Defendants”) have filed a Motion for Leave to Amend Invalidity Contentions (“Motion”), (D.I. 121), and Plaintiffs BioDelivery Sciences International, Inc. and Arius Two, Inc. (“Plaintiffs”) oppose the Motion, (D.I. 125), and the Court has considered the parties’ briefs, (D.I. 121; D.I. 134; D.I. 138), and heard argument on February 10, 2020 (D.I. 174, hereinafter “Tr.”):¹

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. With their Motion, Defendants seek to amend their invalidity contentions, in order to add certain defenses pursuant to 35 U.S.C. § 112. (Tr. at 13) Here, in the governing Scheduling Order, the District Court required that if a party seeks to amend its initial

¹ This case is referred to the Court to resolve all disputes relating to discovery and the protective order. (D.I. 57)

infringement or invalidity contentions, it must first make a showing of good cause. (D.I. 39 at ¶ 7); *see also* Fed. R. Civ. P. 16(b)(4). Both parties agree (and the Court agrees) that a movant seeking to show that good cause has been established in this situation would, at a minimum, need to demonstrate that it has acted diligently in moving to amend. (D.I. 121 at 4 (citing *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1363-68 (Fed. Cir. 2006); *Bayer Cropscience AG v. Dow AgroSciences LLC*, Civil Action No. 10-1045-RMB-JS, 2012 WL 12904381, at *1 (D. Del. Feb. 27, 2017); D.I. 134 at 5 (citing *O2 Micro*); *see also* D.I. 39 at ¶ 7 (noting, in setting out exemplary showings of good cause, that diligence on the part of the moving party is required))

2. Defendants argue that the impetus for amendment was the District Court's construction of certain claim terms (the "layer terms"); the District Court first informed the parties of its constructions for these claim terms during the December 20, 2019 *Markman* hearing (wherein the District Court adopted Plaintiffs' proposed constructions for the terms). (D.I. 121 at 1; *see also id.*, ex. A at 40) The Court agrees with Plaintiffs (and with the many courts who have concluded the same) that in general, when a party seeks to amend contentions in light of on a district court's claim construction order, "the moving party's diligence, without which there is no good cause, [should be] measured from the day the moving party received the proposed [claim] constructions, not the date of issuance of the Court's claim construction opinion." *Word to Info Inc. v. Facebook Inc.*, Case No. 15-cv-03485-WHO, 2016 WL 6276956, at *4 (N.D. Cal. Oct. 27, 2016) (internal quotation marks and citations omitted) (citing cases), *aff'd*, 700 F. App'x 1007 (Fed. Cir. 2017); *Takeda Pharm. Co. Ltd. v. Sun Pharma Global FZE*, Civil Action No. 14-4616 (MLC), 2016 WL 9229318, at *4-5 (D.N.J. May 16, 2016). This general rule makes good sense, as: (1) if a movant seeks amendment in light of a court's

adoption of a construction that was previously proposed many months earlier; and (2) the movant was nevertheless always found to have acted diligently; then (3) this “would mean that [the moving] party could wait until after the construction to take action, even though [in many cases] they were fully equipped to act sooner.” *Takeda*, 2016 WL 9229318, at *5 (citation omitted). Such an outcome would promote and reward delay and inefficiency, not diligence.

3. Of course, there are scenarios where, even after a *Markman* order issues, a movant’s attempt to amend contentions might still be found to be diligent. One such scenario could be if the district court adopted a construction that had not been proposed by any party—and that new construction was the basis for the subsequent motion to amend. See *Word to Info*, 2016 WL 6276956, at *4-5. Another could arise if a party had earlier put forward a claim construction for a term, but was deliberately vague about the construction’s true meaning or scope (e.g., where the party only made clear the true proposed meaning or scope of the construction during the *Markman* hearing itself).² This latter scenario is what Defendants argue occurred here. Defendants assert that even though Plaintiffs put forward their construction for the layer terms (and provided some explanation in support thereof) on September 13, 2019³ in Plaintiffs’ opening claim construction brief, (D.I. 54), it was not truly until the December 20, 2019 *Markman* hearing “that the full scope and consequences of [Plaintiffs’] arguments [about the layer terms] became apparent.” (D.I. 138 at 2; see also Tr. at 7-8)

² There could, of course, be other such similar scenarios.

³ For their part, Plaintiffs note that they served a draft chart with proposed constructions for the layer terms even earlier—on August 27, 2019; they suggest that this is the actual date from which diligence should be measured. (D.I. 134 at 3, 7 & ex. G) The Court, however, will focus herein on the September 13, 2019 date. The Court need not decide whether the August 27, 2019 date is the right “starting point” here, in light of its decision below.

4. The Court is not persuaded by this argument. Prior to claim construction briefing, the parties had proposed constructions for the layer terms, which are found in certain of the patents-in-suit. With their proposed constructions, Defendants asserted that the layer at issue was a “solid” layer; Plaintiffs put forward constructions for the terms that did not include the word “solid.” (D.I. 134, ex. G) Then, in their September 13, 2019 opening claim construction brief, Plaintiffs articulated several supporting rationales for why they took their view. Importantly, they explained there that adding “solid” to the claim term failed to fully capture the covered product described in the specification, which begins “in solid form” but “ultimately erodes or dissolves over time[.]” (D.I. 84 at 10; *see also id.* at 10-11 (“While the mucoadhesive layer is *in solid form*, as opposed to a liquid or a gas, *at stages during the administration to a patient*, there is no reason why this particular feature needs to be added to the claim.”) (emphasis added); Tr. at 30-31, 41-42) Plaintiffs reiterated this same view in their reply claim construction brief, served on October 29, 2019. (D.I. 66) There, they again argued—repeatedly—that even though the layer “is not an aqueous solution[,], [it] does not mean that the word ‘solid’ needs to be read into the claim, *particularly where the layer erodes over time* and the inventors chose to use the word ‘bioerodable’ to define the layer, as opposed to ‘solid.’” (D.I. 84 at 66 (certain internal quotation marks and citation omitted) (emphasis added); *see also id.* at 20, 27) And then, during the December 2019 *Markman* hearing, Plaintiffs’ counsel again made the same point in support of Plaintiffs’ proposed constructions, explaining that “[t]he written description does not refer to a solid bioerodable mucosal layer pretty much because it dissolves. . . [i]t goes away [i]t’s not there after 20 to 30 minutes[.]” (D.I. 121, ex. A at 23; *see also id.* at 38 (Plaintiff’s counsel referring to the layer during the *Markman* hearing as a “bioerodable 50-micron layer that goes away”); Tr. at 43) In sum, so far as the Court can tell, Plaintiffs’ position

Plaintiffs' position as to the "right" constructions for these terms and their rationale behind these constructions have been evident since September 13, 2019, when Plaintiffs served their opening claim construction brief on Defendants. And Defendants have not otherwise sufficiently explained why this is not so.

5. Having therefore established that Defendants were on notice of the need to move to amend at least as early as September 13, 2019, the Court notes that Defendants did not file this Motion until January 6, 2020. (D.I. 121) Absent the existence of other mitigating circumstances, which are not present here,⁴ this nearly four-month delay demonstrates a lack of diligence on Defendants' part. *See Word to Info*, 2016 WL 6276956, at *6 (finding that a four-to-five-month delay prior to the proposed amendment demonstrated a lack of diligence); *O2 Micro*, 467 F.3d at 1367-68 (affirming a district court ruling concluding that a three-month delay in serving proposed amended contentions amounted to a lack of diligence); *Par Pharm., Inc. v. Takeda Pharm. Co., Ltd.*, Case No. 5:13-cv-01927-LHK-PSG, Case No. 5:13-cv-02416-LHK-PSG, Case No. 5:13-cv-02420-LHK-PSG, 2014 WL 3704819, at *2 (N.D. Cal. July 23, 2014) (finding that a four-month delay showed a lack of diligence); *Acer, Inc. v. Tech. Props. Ltd.*,

⁴ Defendants cite to opinions in a few other cases where a delay of four months (or longer) did not preclude a finding of diligence. (D.I. 121 at 8) However, diligence is a "fact sensitive" inquiry, *see Bayer Cropscience AG*, 2012 WL 12904381, at *1 n.1, and the cases that Defendants cite usually presented some other, mitigating circumstances not present in this case. *See, e.g., Karl Storz Endoscopy-Am., Inc. v. Stryker Corp.*, Case No. 14-cv-00876-RS (JSC), 2016 WL 2855260, at *6 (N.D. Cal. May 13, 2016) (finding that although the movant filed its motion to amend 15 months after initially discovering the prior art references at issue, it had established diligence, but only because the motion was pending for one of those months, the case was stayed for nine of those months, and the movant had notified the opposing party of its intent to amend the contentions immediately when the stay was lifted); *Vasudevan Software, Inc. v. Int'l Bus. Machs. Corp.*, No. C09-05897 RS (HRL), 2011 WL 940263, at *2 (N.D. Cal. Feb. 18, 2011) (concluding that a delay of four months between the amending party's earliest notice of the potential need to amend and the amendment of its contentions was not preclusive, where the party worked diligently throughout that four-month period to confirm its understanding of the technology and its need to amend).

Nos. 5:08-cv-00877 JF/HRL, 5:08-cv-00882 JF/HRL, 5:08-cv-05398 JF/HRL, 2010 WL 3618687, at *4-5 (N.D. Cal. Sept. 10, 2010) (concluding that a party was not diligent in waiting three months after a stay was lifted to begin investigation and another three weeks to file amended infringement contentions); *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 WL 1067548, at *2 (N.D. Cal. Mar. 27, 2012) (finding that a delay of two and one-half months demonstrated a lack of diligence). Accordingly, Defendants' Motion is DENIED.

6. Because this Memorandum Order may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version (if necessary) of the document. Any such redacted version shall be submitted by no later than **February 25, 2020**, for review by the Court, along with a motion for redaction that includes a clear, factually detailed explanation as to why disclosure of any proposed redacted material would "work a clearly defined and serious injury to the party seeking closure." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Memorandum Order.



Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE

EXHIBIT 6

From: [Engelmann, Holly E.](#)
To: [Corey Johanningmeier](#); [BDIP_Ramot](#); [Mayo, Andrew C.](#)
Cc: [Ying, Jennifer](#); [Gaudet, Matthew C.](#); [Powers, Joseph A.](#); [Saleem, Sajid](#); [Mitchell, Daniel](#)
Subject: RE: Ramot v Cisco/Acacia | Depositions
Date: Tuesday, November 26, 2024 3:01:10 PM

Hi Corey,

We have not received any confirmations of Cisco witness deposition dates from you since our call last week, nor have we received any proposed dates for Ramot witnesses from you. We understand Ramot's position that your firm's caseload will make it difficult to complete discovery by the deadline, but the deadline has been set for a long time, after being re-set multiple times. At this point, we do not see how a further extension of the discovery period is feasible, unless the trial date is moved. Please recall that we noted that Cisco's holiday shutdown prevents us from offering deposition dates during the last two weeks of December.

If Ramot would like to file a motion to extend the case schedule and postpone the trial date, we would likely not oppose such a motion (subject to accommodating any conflicts that our team or witnesses would have). But regardless, we have made our witnesses available during the fact discovery period and if Ramot elects to forego the opportunity to take these Cisco depositions (leaving aside the consequences for Ramot's failure to make its witnesses available during the fact discovery period), we will not be offering them for later dates under the present schedule.

For ease, the dates we have offered are listed below – note that since we offered a date for [REDACTED] [REDACTED] has since needed to move his availability to December 13. Please also recall that [REDACTED] is presenting a witness on December 5.

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

HOLLY ENGELMANN, P.C. | Duane Morris LLP

From: Corey Johanningmeier <cjohanningmeier@bdiplaw.com>
Sent: Wednesday, November 20, 2024 12:17 PM
To: Engelmann, Holly E. <HEngelmann@duanemorris.com>; BDIP_Ramot <bdiplaw@bdiplaw.com>; Mayo, Andrew C. <AMayo@ashbygeddes.com>
Cc: Ying, Jennifer <jying@morrisnichols.com>; Gaudet, Matthew C. <MCGaudet@duanemorris.com>; Powers, Joseph A. <JAPowers@duanemorris.com>; Saleem, Sajid <SSaleem@duanemorris.com>; Mitchell, Daniel <DMitchell@duanemorris.com>

Subject: RE: Ramot v Cisco/Acacia | Depositions

A couple quick points to save time on the call. We are going to need designations corresponding to the topics in our August 15, 2023 Rule 30(b)(6) deposition notices to Cisco and Acacia. Also, in August of 2023 we served 30(b)(1) notices on [REDACTED] who I understand has subsequently left Cisco for [REDACTED], and on [REDACTED] who is still at Cisco but you have left off the list below.

From: Corey Johanningmeier <cjohanningmeier@bdiplaw.com>
Sent: Wednesday, November 20, 2024 9:57 AM
To: Engelmann, Holly E. <HEngelmann@duanemorris.com>; BDIP_Ramot <bdip_ramot@bdiplaw.com>; Mayo, Andrew C. <AMayo@ashbygeddes.com>
Cc: Ying, Jennifer <jying@morrisnichols.com>; Gaudet, Matthew C. <MCGaudet@duanemorris.com>; Powers, Joseph A. <JAPowers@duanemorris.com>; Saleem, Sajid <[SSaleem@duanemorris.com](mailto:ssaleem@duanemorris.com)>; Mitchell, Daniel <DMitchell@duanemorris.com>
Subject: RE: Ramot v Cisco/Acacia | Depositions

Holly, let's discuss on the phone today, 6pm eastern / 3pm pacific works for me, can you send a dial-in? Thanks.

From: Engelmann, Holly E. <HEngelmann@duanemorris.com>
Sent: Wednesday, November 20, 2024 9:53 AM
To: Corey Johanningmeier <cjohanningmeier@bdiplaw.com>; BDIP_Ramot <bdip_ramot@bdiplaw.com>; Mayo, Andrew C. <AMayo@ashbygeddes.com>
Cc: Ying, Jennifer <jying@morrisnichols.com>; Gaudet, Matthew C. <MCGaudet@duanemorris.com>; Powers, Joseph A. <JAPowers@duanemorris.com>; Saleem, Sajid <[SSaleem@duanemorris.com](mailto:ssaleem@duanemorris.com)>; Mitchell, Daniel <DMitchell@duanemorris.com>
Subject: Ramot v Cisco/Acacia | Depositions

[EXTERNAL]

Hi Corey,

We have offered several of the following dates and need to confirm them as soon as possible because people are holding their calendars for your team to conduct depositions. Since you said December 10 does not work, we offer [REDACTED] on December 11. We added a date for [REDACTED]. This should be the entirety of the Cisco deposition witness lineup.

- [REDACTED]
- [REDACTED]
- [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

Thanks,
Holly

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EXHIBIT 7

FOR THE DISTRICT OF DELAWARE

ENZO LIFE SCIENCES, INC.

Plaintiff,

V.

ROCHE MOLECULAR SYSTEMS, INC.,
ROCHE DIAGNOSTICS CORPORATION,
ROCHE DIAGNOSTICS OPERATIONS, INC.
and ROCHE NIMBLEGEN, INC.

Defendants.

C. A. No. 12-106-LPS

JURY TRIAL DEMANDED

[PROPOSED] ORDER

WHEREAS, Defendants Roche Molecular Systems, Inc., Roche Diagnostics Corporation, Roche Diagnostics Operations, Inc. and Roche Nimblegen, Inc. (collectively, “Roche”) moved to strike the newly accused products of Roche set forth in Enzo Life Sciences, Inc.’s Supplemental Infringement Charts dated September 30, 2014 (the “Motion”);

WHEREAS, the Court considered the Motion and opposition thereto;

IT IS HEREBY ORDERED this 10 day of January, 2015, for the reasons set forth by the Court during the December 18 conference, that Roche's Motion to Strike Enzo's Newly Accused Products (D.I. 168) is GRANTED in full as follows: The newly accused products of Roche, as listed in Exhibit 1 to this order, are stricken from Enzo Life Sciences, Inc.'s Supplemental Infringement Charts dated September 30, 2014.

The Honorable Leonard P. Stark
Chief, United States District Judge

EXHIBIT 1

Stricken Roche Products¹

1. COBAS® TaqMan® MTB Test
2. cobas® HPV Test
3. cobas® KRAS® Mutation Test
4. cobas® TaqScreen DPX Test
5. cobas® 4800 MRSA/SA Test
6. cobas® C. diff Test
7. cobas® HSV Test
8. cobas® EGFR Test
9. cobas® HEV Test
10. cobas® CMV Test
11. cobas® HSV 1 and 2 Test
12. Affymetrix GeneChip technology-based products other than AmpliChip CYP450

Tests:

- CF
- HLA
- HPV
- Leukemia
- PS3
- Osteo
- CVD Risk
- Rheumatoid Arthritis Monitoring and Therapy Monitoring
- Asthma Therapy Prediction
- Hypertension Therapy Prediction
- Stroke Predisposition
- HIV Genotyping

¹ The products identified in Enzo's September 2013 infringement contentions are not subject to the Court's ruling on Roche's motion.

EXHIBIT 8

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

NOKIA CORPORATION, NOKIA, INC., : CIVIL ACTION
INTELLISYNC CORPORATION, and :
NAVTEQ NORTH AMERICA, LLC, :

Plaintiffs,

v

HTC CORPORATION, HTC AMERICA, INC., :
and EXEDEA INC., :

Defendants.

: NO. 12-550-LPS

NOKIA CORPORATION and NOKIA, INC., : CIVIL ACTION

Plaintiffs,

v

HTC CORPORATION, HTC AMERICA, INC., :
and EXEDEA INC., :

Defendants.

: NO. 12-551-LPS

- - -

Wilmington, Delaware
Tuesday, December 17, 2013
Telephone Conference

- - -

BEFORE: HONORABLE **LEONARD P. STARK**, U.S.D.C.J.

- - -

APPEARANCES:

FARNAN, LLP
BY: BRIAN E. FARNAN, ESQ.

and

Brian P. Gaffigan
Official Court Reporter

1 APPEARANCES: (Continued)

2

3 DESMARAIS, LLP
4 BY: ALAN S. KELLMAN, ESQ., and
5 JASON BERREBI, ESQ.
6 (New York, New York)

7 Counsel on behalf of plaintiffs

8

9 POTTER, ANDERSON & CORROON, LLP
10 BY: DAVID E. MOORE, ESQ.

11 and

12 McDERMOTT WILL & EMERY, LLP
13 BY: D. STUART BARTOW, ESQ.,
14 MASHHOOD RASSAM, ESQ., and
15 PHILIP OU, ESQ.
16 (Menlo Park, California)

17 Counsel for HTC Corporation
18 and HTC America, Inc.

19

20

21

22

23 - oOo -

24 P R O C E E D I N G S

25 (REPORTER'S NOTE: The following telephone
conference was held in chambers, beginning at 11:31 a.m.)

THE COURT: Good morning, everybody. This is
Judge Stark. Who is there, please?

MR. FARNAN: Good morning, Your Honor. It's
Brian Farnan for the plaintiffs and with me is Alan Kellman
and Jason Berrebi from Desmarais, LLP in New York City.

1 THE COURT: Okay. Somebody is moving around
2 making an awful lot of noise. I will ask you to stop.

3 Thank you, Mr. Farnan. Who is there for
4 defendants, please?

5 MR. MOORE: For HTC, Your Honor, David Moore at
6 Potter Anderson. With me on the line from McDermott Will &
7 Emery are Stuart Bartow, Mashhood Rassam and Philip Ou.

8 THE COURT: Okay. Thank you. Is that it today?

9 MR. FARNAN: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. MOORE: Yes, it is.

12 THE COURT: Thank you. I have my court reporter
13 here, of course; and for the record, it is our case of Nokia
14 corporation, et al. versus HTC Corporation, et al., two
15 civil actions, Civil Action 12-550-LPS as well as
16 12-551-LPS. Today is our time to talk about discovery
17 disputes, primarily raised by the defendants, also some
18 raised by the plaintiff.

19 I want to start with the issues raised by the
20 defendants HTC and go through them, hearing from both sides,
21 issue by issue in the order that the issues are raised in
22 the defendants' letter, so that means we'll hear first from
23 HTC on the request to strike the new dependent claims and
24 new accused products. So, HTC, you may go ahead.

25 MR. RASSAM: Good morning, Your Honor. This is

1 Mashhood Rassam.

2 HTC is asking that Nokia's amended infringement
3 contentions which were served right after the claim
4 construction hearing be struck to the extent they add new
5 claims and new products. And I just want to start by giving
6 the Court a little bit of context here.

7 Claim construction processes in this case, Your
8 Honor, started in July. It lasted over four months and
9 culminated in a six hour hearing before you on November 21st.

10 On November 25th, two business days later, we get
11 Nokia's amended infringement contentions, and these contentions
12 add new claims and new products. In particular, the new
13 claims impact the claim construction process because they
14 recite new terms which we're assessing but which may need to
15 be construed. They also impact the 101 hearing before the
16 Court because two of the claims, two of the new claims are
17 dependent claims that depend from the independent claims
18 which HTC argued weren't valid for lack of subject matter,
19 because they weren't patentable subject matter.

20 We know that Nokia was working on these amended
21 contentions, Your Honor, long before the hearing. Exhibit D
22 to our letter brief shows that Nokia was assessing, was
23 working on new contentions at least since November 12th, yet
24 at no time during the hearing, Your Honor, did Nokia tell us
25 that it was preparing to amend the contentions in a way that

1 would impact claim construction and our 101 argument.

2 Instead, they strategically amended two days later.

3 Your Honor, we think these contentions should
4 be struck for two reasons:

5 First, they demonstrate a lack diligence on
6 Nokia's part. Nokia obviously had the claims when it served
7 its first set of infringement contentions in June, but it
8 chose not to assert those claims. Now, Nokia says we didn't
9 have source code at that time so we couldn't assert those
10 claims.

11 Your Honor, that argument just does not seem
12 credible. Nokia was able to assert the independent claims
13 of the '870 patent and the '370 patent without source code,
14 and it has given no explanation as to why it needed source
15 code for these dependent claims. And, in fact, if you look
16 at their infringement contentions, no source code has been
17 cited, for instance, for the '370. They just have a screen
18 shot.

19 So they haven't been diligent, Your Honor, in
20 adding the new claim, and they haven't been diligent in
21 adding the new products. They've added 11 new products
22 here, Your Honor. By my count, 10 of them were available --
23 nine of them were available before Nokia served its initial
24 infringement contentions, ten of them were available before
25 claim construction briefing began in this case, yet Nokia

1 didn't assert those products.

2 Now, they say in a footnote in their letter
3 brief that, for instance, they have added a bunch of the
4 new products for the '884 patent. That's the EMR shielding
5 patent, Your Honor. And they say, well, we needed to
6 examine, we needed to open up the phone and examine them to
7 assert infringement.

8 Why didn't they do that in June? I've litigated
9 before against the Desmarais firm representing HTC. I see
10 they have many of these phones in their possession. They
11 choose not to do the analysis in June. They shouldn't now
12 be able to, late in the discovery process, come in with new
13 products, Your Honor. They just have not been diligent.

14 Also, Your Honor, we think that the new
15 contentions should be struck because they burden the Court and
16 they inflict prejudice on HTC. These new claims may need to
17 be construed. We're still assessing that, but there is a
18 whole claim construction process that now needs to happen
19 where the parties meet and confer, exchange proposals, try
20 to narrow the differences between them, and that may result
21 in new briefing and a new hearing before the Court.

22 We may also need to revisit our 101 hearing and
23 briefing. We're still assessing that, Your Honor.

24 So all of that can inflict additional burden on
25 the Court. It also prejudices HTC, Your Honor. We now have

1 to, with less than three months left in discovery, Your
2 Honor, with the holidays in between, we have to now start an
3 invalidity prior art search from scratch to try to address
4 these new claims. That just inflicts deep prejudice on us.
5 And also not to mention the extent our client has paid, has
6 expended a lot of effort to go through the claim construction
7 process, and now we have to revisit that process again.

8 So, Your Honor, due to Nokia's lack of diligence,
9 the prejudice on HTC, the burden on the Court, their new
10 contentions should be struck. They made a tactical decision
11 to sit on these contentions and serve them after the claim
12 construction hearing. They should not be allowed to do that,
13 Your Honor.

14 Thank you.

15 THE COURT: Thank you. Let me hear from the
16 plaintiff, please.

17 MR. BERREBI: Good morning, Your Honor. Jason
18 Berrebi for Nokia. I just want to walk through the points
19 that defendants raise in the order they raised them.

20 The first position that they were arguing here
21 was regarding claim construction and the potential need for
22 claim construction.

23 As an initial matter on that point, at this
24 point HTC says they're still assessing it so I think it's a
25 moot point on this issue and hasn't been raised as to how,

1 if at all, there would be need for any construction at this
2 point.

3 THE COURT: Well, Mr. Berrebi, let me interrupt
4 you.

5 Why, at this point, should they have to go to
6 the trouble of assessing whether there needs to be additional
7 claim construction? And why should I even take the risk that
8 I may have to do more claim construction?

9 MR. BERREBI: Well, I don't think that is the
10 issue, Your Honor, especially if you look at the joint claim
11 construction sheet between the parties, even at that point
12 the defendants had made a decision call to only put certain
13 terms in front of Your Honor and the Court to construe. And
14 I think that is the process of claim construction generally.
15 You put the issues that are most significant and are
16 dispositive to the case in front of the Judge. There just
17 isn't enough time to put everything before the Court.

18 That is the case with these terms. Unless they
19 claim, which they haven't done so far, that this is one of
20 those terms that would be case dispositive to the terms or
21 the claims, I just see this being an issue even.

22 THE COURT: Okay. Go on.

23 MR. BERREBI: Turning to their second point
24 about the 101 motion practice. Again, first of all, at
25 this point, HTC has not put forward again any comments or

1 reasoning of why they think these two additional dependent
2 claims would have any bearing on the 101 motion and the
3 postures that are put forward there.

4 Just as a more important note, I think they raise
5 this as a tactical matter. Again, Your Honor, one of the
6 points we raised here is that this isn't for the purpose of
7 adding claims, nothing to do with the 101 motion, and that
8 can be seen by the addition of the '870 claim. I think this
9 is just part of the discovery process itself generally. And
10 according to the local rules on discovery, I believe the party
11 has the ability to supplement their infringement contentions
12 through that fact discovery, and that is what we have done here.

13 THE COURT: Is there anything else?

14 MR. BERREBI: Well, turning to the point on the
15 source code, Your Honor. Again, at the point of supplementing
16 infringement contentions, the source code hasn't been provided
17 to us in hard copy to include in our infringement contentions,
18 so I don't think that is a fair point, Your Honor, to state
19 that we haven't and won't include that supplementation. There
20 was supplementation related to the infringement obtained
21 during that process and will be included in the infringement
22 charts going forward and as they are further supplemented
23 during discovery.

24 THE COURT: All right. Thank you. Is there
25 anything further from HTC on this one?

1 MR. RASSAM: Just very briefly, Your Honor.

2 Simply because we choose not to construe some
3 other terms when we went through the initial claim
4 construction process does not mean that new terms do not
5 need to be addressed here. For instance, if you look at
6 claims 3 and 52 for the '370 patent which were added, there
7 is a term "broadcast reference signal." I look at Nokia's
8 infringement contentions, I can't tell what that means.
9 That is going to be important to the issue of noninfringement.

10 We're assessing that term but that is likely
11 significant that may need to get construed. I didn't hear
12 anything from Mr. Berrebi that says otherwise.

13 Same with claim 5 of the '870 patent. It has
14 several terms like "close proximity," "reception channel
15 frequency," "predetermined pitch relation."

16 All of those terms we need to have an understand-
17 ing of them, Your Honor, to be able to determine if we
18 infringe or not. So the claim construction needs to start
19 back up in this case, the process needs to start back up so
20 that we can assess where we stand and what our noninfringement
21 positions are.

22 Let me just briefly note the issue of source
23 code, Your Honor. Mr. Berrebi was in our office reviewing
24 source code for a week. If he really needed to cite source
25 code for these new claims, which again does not appear

1 credible since he was able to assert infringement against
2 the independent claims, why didn't he use his notes to say,
3 look, we think these packages, these source code packages
4 are implicated for these claims? Why didn't they leave a
5 placeholder in the infringement contentions saying, look, we
6 think source code is needed for these particular claims but
7 we're waiting for that to be produced?

8 None of that was done, Your Honor. In fact,
9 these contentions are backed up with screen shots. And the
10 reason for that is source code was not needed and it appears
11 to be an after-the-fact excuse to justify Nokia's lack of
12 diligence, Your Honor.

13 THE COURT: What about Mr. Berrebi's point about
14 supplementation is permitted at least until well into the
15 discovery period, if not beyond?

16 MR. RASSAM: Well, Your Honor, I don't doubt a
17 plaintiff can supplement. A plaintiff can come in, assert
18 a certain set of claims and as discovery is made available,
19 they can potentially add some evidence to back up their
20 contentions.

21 That is not what is going on here. It's not
22 that Nokia is looking at the discovery and then backing up
23 the allegations they had initially made. They are coming
24 in and adding new claims that they could have added earlier
25 in the case. They're coming in and added new products that

1 they could have added in the case. So just because you
2 can bring in new contentions doesn't mean you have a right
3 not -- doesn't mean you just have a carte blanche not to be
4 diligent.

5 And I don't think that the right to sort of
6 supplement contentions means that you can inflict prejudice
7 on HTC. I think prejudice has to be taken into account
8 here. We now have to start back our invalidity process as
9 discovery is only a couple months away from closing. So
10 simply because they can amend doesn't mean they can inflict
11 prejudice on us.

12 THE COURT: All right. Thank you. On this
13 issue --

14 MR. BERREBI: Your Honor.

15 THE COURT: I've heard enough. Thank you.

16 On this one, I'm going to grant HTC's request, and
17 I am hereby striking the amended infringement contentions
18 served by Nokia to the extent that HTC has asked me to
19 strike them, particularly with respect to the new asserted
20 independent claims and the new accused products.

21 On the surface, having reviewed all the materials
22 and having heard the argument, this does look like a tactical
23 decision on the part of plaintiff to serve these supplemental
24 infringement contentions in the time frame that they did after
25 clearly everybody, including the Court, invested enormous

1 resources in preparing for what was a very lengthy and complex
2 Markman hearing as well as argument on the 101 motion, and
3 then to find that just a couple of days later, there was an
4 effort made to expand the case looks, as I say, like a tactical
5 decision; and, unfortunately, I see nothing in the record and
6 have heard nothing today to make any of that appear more
7 justifiable at this point.

8 So under the circumstances, I do think and find
9 that there is a demonstrated lack of diligence as well as
10 resulting unfair prejudice to the defendant, and an unfair
11 and really unwise burden attempted to be imposed on the Court.

12 It is true that supplementation may, in the
13 right circumstances, be permitted at this point in the case
14 or even at a later point in an appropriate case, but under
15 the circumstances here, I see no basis to permit the
16 supplementation attempted by the plaintiff at this point in
17 this case in this manner. So, again, I'm granting HTC's
18 request for relief.

19 Let's move on to the second issue whereby HTC is
20 asking the plaintiff to identify some purported first
21 embodiment of the asserted claim. Let me hear from HTC on
22 that one, please.

23 MR. BERREBI: Your Honor, just for a point of
24 clarification. Jason Berrebi from Nokia.

25 There was also an issue raised about the new

1 products. From everything that we have seen briefed and
2 even as framed by the letters to the Court, those new
3 products are only with respect to the '884 patent and
4 actually some of those devices actually appear in some of
5 the other patents that are being asserted already.

6 So I just want to make sure the record is
7 clear that you're agreeing with them or if you are agreeing
8 with them only with respect to the '884 patent about the
9 addition of new products.

10 THE COURT: Mr. Rassam, do you want to address
11 that?

12 MR. RASSAM: Sure, Your Honor.

13 I don't think that new products are only with
14 respect to the '884 patent. For instance, I'm looking at my
15 chart here, and I think the one Mini is asserted against the
16 '263, '351, '788 and '953 patents. The Mini Plus, Your
17 Honor, is asserted against the '870 patent. So we're not
18 just talking about as to the '884 patent. They have
19 asserted new products against other patents as well, and we
20 don't think they should be allowed in the case.

21 THE COURT: Mr. Rassam, so your request for
22 relief with respect to the new accused products is precisely
23 what?

24 MR. RASSAM: My request, Your Honor, is that the
25 new products that have been added as to the '884 patent, as

1 to the '263, '351, '788, '953, and '870 patents also not be
2 allowed.

3 THE COURT: And, Mr. Berrebi, yes, given what I
4 have said, why should I not just go ahead and clarify that I
5 have already granted the full extent of the relief asked for?

6 MR. BERREBI: Your Honor, especially, the
7 parties haven't even met and conferred or even discussed the
8 issues about the other patents. Their letters up to this
9 point and our phone calls have all been related to the '884
10 patent and evidence provided to the defendants relates to
11 that.

12 As for the new products, I believe our
13 infringement contentions are broad enough to include any
14 product developed and that are being produced by HTC during
15 the discovery process. To limit Nokia from including those
16 new products now would be unfair and would be part of the
17 fact discovery process. Those are brand new products that
18 weren't available to Nokia prior to the initial infringement
19 contentions.

20 THE COURT: All right. Mr. Rassam, do you want
21 to have the last word on this?

22 MR. RASSAM: Sure. Your Honor, to the extent a
23 product was added after the initial infringement contentions,
24 I think, if I'm right, that only implicates the Mini Plus, but
25 if the product was still released before claim construction

1 briefing began in this case, I don't see why they waited
2 for month to add it. Why didn't they add it earlier? So I
3 think to the extent products were on the market before claim
4 construction briefing began and Nokia failed to add them,
5 those products should be struck.

6 THE COURT: Well, I think I'm going to stick to
7 my ruling, which is granting the relief that was sought by
8 HTC. I think given how the issue was presented to me and
9 given my finding about lack of diligence and prejudice and
10 burden, it follows that the full extent of the relief sought
11 by HTC in its letter is granted.

12 So let's move on now to the second issue. And,
13 again, we'll hear from HTC on that first.

14 MR. BARTOW: Thank you, Your Honor. This is
15 Stuart Bartow on behalf of HTC.

16 With respect to the first embodiment issue, Your
17 Honor, Nokia refuses to respond to basic fundamental
18 discovery about whether any of its products ever practiced
19 the asserted claims. And I don't know of any better way to
20 show this to Your Honor than to point you to, I believe it's
21 Exhibit I to our letter briefing and show you Interrogatory
22 No. 6, which we served on March 5th, 2013, so about nine
23 months ago.

24 That interrogatory requests that Nokia identify
25 the product or thing that constitutes the first embodiment,

1 and also to identify when it was offered for sale, first
2 sold, first publicly used, first publicly disclosed or first
3 disclosed to anyone not an employee of Nokia, or an assignee.

4 We made that request, that interrogatory because
5 these issues are basic and fundamental to the issues of,
6 among other things, conception and reduction to practice of
7 the claims at issue, potentially damages, public use, the
8 on-sale bar -- and I know that Your Honor has dealt with
9 the on-sale bar on a number of occasions over the past few
10 years. It's relevant to all of those issues.

11 If you look at page 8 of Exhibit I, Nokia's
12 response, their initial response to this -- and this is back
13 on May 6th. We probably should have included the dates in
14 there. Their first response was the patents in suit are
15 presumed valid under 35 U.S.C., Section 282. HTC has the
16 burden to prove invalidity by clear and convincing evidence.
17 HTC has not identified any evidence to disturb the presumption
18 of validity, nor has it identified evidence to prove invalidity
19 by clear and convincing evidence.

20 That was the sum total of their response, Your
21 Honor.

22 Their next response, their supplemental response
23 on October 21st, 2013, in that response, they said -- and
24 I'll point you to the second line of that, which is about
25 halfway down the document. They say: "HTC contends that

1 the Nokia 2010, 2060, and Nokia 9000 devices are responsive
2 to those interrogatories."

3 In addition it's not what Nokia says, it's not
4 their contention. They're saying HTC contends that these
5 are prior art products.

6 Well, that wasn't the question at all. What we
7 really want to know is were these products ever reduced to
8 practice and sold by Nokia? If so, when? Who was involved?
9 I mean this is just basic fundamental discovery that goes to
10 the issues that I mentioned earlier; and they simply haven't
11 responded, and they haven't been willing to respond.

12 I mean I guess I should say they provided a
13 little bit of information on the '870 patent. They mention
14 one product, the Nokia 6310, but they haven't responded on
15 any of the other products at all.

16 Now, I know that Nokia's response in their
17 letter briefing is that they don't -- they're characterizing
18 this as a request for them to go back through all of their
19 prior art products, perform an infringement analysis and
20 report the results back. That is not what we're asking for
21 at all.

22 Your Honor, in my experience in a few years
23 of patent litigation and in what I will call a prior life
24 as an engineer, big technology companies don't just drop
25 these things out of the sky in a Eureka moment. I suspect,

1 strongly suspect that these products were -- these patents
2 were derived from certain product development products,
3 certain research projects that were undertaken at Nokia.
4 And Nokia knows very well what they are. And for all sort
5 of reasons, including accounting and tax purposes, companies
6 like Nokia track what patents are being used in what products.
7 So I believe Nokia absolutely has the resources to answer
8 these questions, if they haven't already.

9 Oh. And, by the way, they also represent most
10 of the inventors of these patents. They're represented by
11 Desmarais and they are still affiliated with Nokia, many of
12 them.

13 So I know that is what you are going to hear,
14 but we believe that this is simply fundamental discovery
15 to which we're entitled, and we would ask that the Court
16 order Nokia to provide more fulsome answers to our
17 interrogatories, including Interrogatory No. 6.

18 Thank you, Your Honor.

19 THE COURT: So you have drawn our attention
20 to Interrogatory No. 6, but let me ask you, are there --
21 there are certain products that HTC has identified that it
22 believes are embodiments of some of these patents. Correct?

23 MR. BARTOW: That is true, Your Honor.

24 THE COURT: So have you served an interrogatory
25 asking the plaintiff for requests for admission or something

1 to simply get the plaintiff's position on whether products
2 you have identified are, in their view, embodiments of their
3 patents?

4 MR. BARTOW: In at least one instance, we have,
5 Your Honor. And we have had no response.

6 THE COURT: You got a similar type of response?

7 MR. BARTOW: Correct.

8 THE COURT: So why isn't the answer here that
9 you need to identify the products first and then ask the
10 plaintiff to disclose its position in the context of respond-
11 ing to an invalidity contention, for instance, identify its
12 position only at that point as to whether or not what you have
13 identified is an embodiment that in some way could be relevant
14 to the validity of their patent?

15 MR. BARTOW: Well, I think we ought to do that
16 as well, Your Honor. But I do think that with respect to --
17 I do think we ought to be entitled to Nokia's position on
18 that issue and their contention. As I mentioned earlier, I
19 do believe that Nokia is in possession of this information
20 and could readily provide it as to whether these patents
21 were in fact incorporated into the products. I don't think
22 it's a matter of infringement analysis or invalidity
23 analysis. I think it's just simply a matter of stating
24 basic facts as to the development of not only these products
25 but any other products that Nokia would contend practice the

1 claims.

2 THE COURT: Have you served document requests
3 seeking production of documents or some sort of record that
4 you speculate would exist that might in their records link
5 up their patents and some of their products?

6 MR. BARTOW: We have, Your Honor. And I believe
7 we specifically have followed up, in fact, regarding that
8 issue with respect to documents relating to the development
9 programs that led to these patents.

10 THE COURT: What is the nature of the response
11 you are getting as to that?

12 MR. BARTOW: Your Honor, well, we haven't seen
13 the documents that we think ought to be there. So I would
14 say either something is missing or perhaps even lost,
15 destroyed over time. I don't know. But certainly they're
16 not there.

17 THE COURT: All right. Let me hear from the
18 plaintiff on this one, please.

19 MR. BERREBI: Your Honor, we're in 100 percent
20 agreement here, I think. The only thing I really need to
21 add to this is we actually have gone through and identified
22 some of the projects that the defendants are asking for.
23 That was actually spelled out and incorporated from Rog No.
24 6 for at least the patents that we were able to investigate
25 and find information regarding those products.

1 And with regard to the production, for the
2 invalidity contentions we received to date, we produced over
3 65,000 pages of documents regarding those actual products.
4 And the parties have agreed some day in the future, we're
5 still working out a date, to exchange those invalidity or
6 validity contentions for noninfringement positions as well.
7 But, again, those have all been played out already through
8 correspondence and I think the parties are in agreement to
9 do that at some point.

10 THE COURT: And that is Mr. Berrebi; correct?

11 MR. BERREBI: Yes, Your Honor.

12 THE COURT: Mr. Berrebi, if there are document
13 requests asking you for project related documents for
14 products that relate to your own patents, you either have
15 provided responsive documents or will be? Is that what you
16 are saying?

17 MR. BERREBI: So long as they're not privileged
18 documents, we have been producing those documents up-to-date
19 and will continue to do so if there are any others that are
20 found.

21 THE COURT: All right. Thank you.

22 Mr. Bartow, is there any response?

23 MR. BARTOW: Just briefly, Your Honor.

24 At least as to the '798 patent, the acoustic
25 path patent and the '884 patent, the shielding patent, we

1 know that both of those were developed at Nokia. We have
2 not had any information by interrogatory and very little, if
3 any, by document request showing any such development.

4 I would also point out that the inventors once
5 again are, by and large, associated with Nokia, and it seems
6 they ought to be able to answer these questions very quickly.
7 So, again, I would just reinforce I think Nokia has the
8 information that it needs to provide a response to this.
9 And on that same note, substantial completion for documents,
10 that date was last Friday and it has passed. So I'm not
11 sure what additional documentation we're going to get but
12 certainly we have been seeking it and we would like to
13 have it.

14 So I think, in sum, due to the high relevance
15 of these documents, the high relevance of these issues in
16 general, I think it would be appropriate for the Court to
17 order Nokia to produce any further documentation that it has
18 regarding any of these development programs.

19 Thank you.

20 THE COURT: All right. Thank you.

21 Well, I'm focused on the dispute that you put
22 in the letter and the relief that you put in the letter. The
23 relief you are asking for is for me to order the plaintiff to
24 respond more fully, more meaningfully to Interrogatory No. 6.
25 I'm not persuaded that I should do that at this time.

1 I do think that to some extent, there is a
2 dispute here as to who has the burden of coming forward
3 initially with this type of information. Given that it
4 arises in the context of invalidity, given the plaintiff's
5 representations that they are and will continue to respond
6 to document requests relating to the underlying issues,
7 given that they will respond to invalidity contentions that
8 are directed to any purported embodiments of their patents,
9 that they will do so at the appropriate time after the
10 defendant has identified the products. Based on all that, I
11 don't see a basis at this time to grant the relief that is
12 asked for in the letter. Therefore, I'm denying HTC's
13 second request.

14 Let's move on to HTC's third request in its
15 letter which relates to a request to compel production of
16 testing material. My question here really to HTC first is,
17 is this dispute still a ripe dispute or is it moot in light
18 of the representations from the plaintiff?

19 MR. BARTOW: Well, Your Honor, my understanding
20 is that we were going to have a supplemental response to
21 Interrogatory No. 14 as of yesterday and we did not, so I do
22 believe the issue is still ripe.

23 So with respect to the '798 patent, as you may
24 recall during the Markman hearing a few weeks ago, our team
25 laid out our understanding that we believe that Nokia is

1 attempting to read "acoustic path" on basically what is a
2 non-path, that is something that is sealed, sealed with a
3 rubber gasket and has a PC bead board behind it, so it's
4 effectively like saying a brick wall is part of an acoustic
5 path. We believe that that is their read. We believe that
6 the tests were conducted in such a way by Nokia such that
7 would reveal their infringement theory. And so we are
8 looking for information, the raw data, whether photographs
9 were taken, video, the device that was used, that sort of
10 information regarding what they did in particular in their
11 testing.

12 And that testing, by the way, is in Exhibit J
13 to our briefing on page 6. You can see one example of
14 one of the graphs that Nokia included in its infringement
15 contentions.

16 After a couple of months of meet and confer,
17 really other than just getting a catalog of what testing
18 equipment was used and production of product manuals for
19 that test equipment, all we really have is one additional
20 sentence worth of detail as to how they did the testing,
21 and that is on page 7 of Exhibit K. In their second
22 supplemental response, they add one sentence:

23 "To isolate operation of only the first acoustic
24 path, the apertures on the mobile phone for the second
25 acoustic path were sealed."

1 Well, that is not a description that is going to
2 allow us to either replicate their testing or meaningfully
3 understand how it was done. And, yes, we are going to have
4 an opportunity to depose the person who did the testing in
5 short order but we don't think we even have the documents
6 right now that we need to do that, Your Honor. We don't
7 have any information on their testing at all. So we would
8 ask that the Court grant this request so that we may -- you
9 know, I think we're entitled to the information that they
10 generated concerning that test.

11 THE COURT: All right. Thank you. Let me hear
12 the plaintiff's response, please.

13 MR. BERREBI: Yes, Your Honor. So Jason Berrebi
14 again for Nokia.

15 At this point, we produced all the documents
16 associated with that testing. We'll be glad to go look
17 again to see that anything else we may have missed.

18 In addition, again, I think counsel for HTC has
19 put forward that we are actually putting up a witness who
20 did the actual testing; and I believe that is scheduled for
21 the second week in January. So I'm not sure exactly what
22 else HTC wants from us at this point.

23 THE COURT: Well, he gave you some specifics:
24 photographs and other things. But I think the broader
25 question is: Have you provided everything? And is it

1 enough to allow HTC to replicate these tests, if they wish
2 to do so?

3 MR. BERREBI: Your Honor, I believe so. I think
4 we produced everything that we have been able to locate that
5 is not privileged, and then we have the witness, that they
6 can ask the fact questions regarding testing, discussions of
7 any of the images that were included in the infringement
8 contention charts. Again, I don't think there is anything
9 else out there, Your Honor.

10 THE COURT: What about the promised supplemental
11 response to Interrogatory No. 14? When is that coming?

12 MR. BERREBI: So Interrogatory No. 14 actually
13 refers to the '404 patent, so I'm not exactly sure how that
14 relates to the issue at hand here. And that -- I believe we
15 reached out to the other side. That should be coming today.
16 Unfortunately, it got lost through the shuffle, and I
17 apologize to them if that is there already.

18 THE COURT: All right. Thank you. Was it
19 Mr. Bartow? Did you want to respond?

20 MR. BARTOW: Just briefly, Your Honor. Yes.

21 I think perhaps there was a misunderstanding
22 on my part concerning that the supplemental response was
23 going to be concerning Interrogatory No. 14. I understand
24 that is related to another patent and not the '798 patent.

25 Notwithstanding that, I do think there is

1 additional -- there must be additional documentation out
2 there concerning the tests. I certainly haven't heard a
3 definitive representation from counsel that it has been
4 produced.

5 Along the lines of the deposition notice, it's
6 true that we noticed -- well, we have about 15 depositions
7 noticed on calendar for January or February, and we note
8 we did that in early December and now the dates that we're
9 getting are kind of late January-ish, early February-ish,
10 and we have a significant concern that we're not going to
11 be able to do our investigation, replication of any relevant
12 tests, et cetera, by the March discovery deadline. So I
13 think we're really jammed at this point, and this is
14 information we have been asking for for quite a long time.

15 I don't think it has been included as responses
16 to the requests for production. So we respectfully would
17 request an order that all such information be produced so
18 that we can conduct, as we have really been jammed for a
19 significant amount of time. In fact, I'm not sure that even
20 having documents by, let's say, late January will cure the
21 prejudice to us.

22 THE COURT: Well, on this one, I'm granting
23 some limited relief in the sense and to the extent that I'm
24 directing the plaintiff to look again, to do your reasonable
25 diligent search and produce to the defendants, to the extent

1 you haven't already, any other nonprivileged materials that
2 relates to this test because I do think that a fair scope of
3 discovery, once you add up interrogatory responses, document
4 responses and then, of course, meaningfully, the deposition
5 of the person who did the test, at the end of all that, the
6 defendants are entitled to be in a position in which they
7 know precisely how the test was run, how the results were
8 achieved, so that they can, if they wish, try to replicate
9 the study or the test.

10 Plaintiffs suggests that they have already
11 produced all of those materials; and if that is the case,
12 of course, I can't make them produce something that doesn't
13 exist, but I am directing that the plaintiff take one
14 additional good faith diligent look to see if there is
15 anything else that falls into this category, and to produce
16 such materials in an expeditious manner and certainly in
17 advance, sufficiently in advance of the deposition of
18 whoever it is that was involved in this test, to allow the
19 defendant a fair opportunity to prepare for that deposition.

20 Are there questions about what I have ordered
21 with respect to this Issue No. 3; first, Mr. Bartow?

22 MR. BARTOW: No, Your Honor. Thank you.

23 THE COURT: And Mr. Berrebi?

24 MR. BERREBI: No, Your Honor.

25 THE COURT: All right. Let's move on to HTC's

1 final issue which relates to production of materials
2 relating to damages. We'll hear briefly first from HTC on
3 this.

4 MR. RASSAM: Your Honor, this is Mashhood Rassam.
5 This request really can be broke up into two ways:

6 First, we would like documents such as memos,
7 studies, presentations that show evaluations of the patents
8 in suit or the valuation of those patents at a part of a
9 portfolio.

10 I'll give you an example: Recently, to great
11 fanfare, Nokia licensed its portfolio to Microsoft for
12 \$1.65 billion. If there is documents out there that show
13 how the portfolio was broken up into that manner, whether
14 there is some patents that are more valuable than others, we
15 think we're entitled to that information.

16 It's clearly relevant. No one disputes that
17 it's relevant. But yet, Nokia, in its briefing, has said
18 that, well, we'll produce some of this stuff but not if it's
19 too speculative. And,

20 Your Honor, I would suggest that Nokia cannot
21 withhold relevant information because counsel for Nokia has
22 judged that information not to have sufficient probative
23 value. If they have relevant information about the valuation
24 of these patents, they need to produce it and let the
25 fact-finder determine the probative value of that information.

1 So that is the first issue, Your Honor. And I
2 can either stop there or move on to the second issue as well.

3 THE COURT: Let's move on. We're starting to
4 run out of time so go ahead.

5 MR. RASSAM: Okay. I apologize, Your Honor.

6 The second issue is that we served an
7 interrogatory that asks for the underlying facts to Nokia's
8 damages analysis. In other words, if they're going to rely
9 on our lost profits analysis, give us the underlying facts,
10 supplement that interrogatory.

11 The interrogatory has been pending since March of
12 this year, Your Honor. If you are going to do a reasonable
13 royalty analysis, Nokia pleads to give us the underlying
14 facts. To date, we have gotten -- after nine months, we have
15 gotten no reasonable response to that interrogatory other
16 than Nokia will ask for the damages that it was due and that
17 It will give us an expert report.

18 That is not the way discovery should be done.
19 They need to supplement in a timely manner.

20 And, Your Honor, Nokia has said that we're
21 forcing them to choose between a reasonable royalty and lost
22 profits too early in the case. We're not forcing them to
23 choose. I'm just saying if you are doing an analysis and
24 you have got facts, give us the facts now. Give us lost
25 profit facts, give us reasonable royalty facts now, and then

1 I understand that down the line you may choose to only
2 pursue one path or the other when you deal with your expert
3 reports. I don't want a full blown expert report right now.
4 I just want the underlying facts, Your Honor.

5 THE COURT: All right. Thank you. Let me hear
6 from plaintiff.

7 MR. KELLMAN: Your Honor, this is Alan Kellman.
8 Let me address them in order.

9 With respect to the valuation document, I'm not
10 really sure what the dispute is here because we have told
11 them, and we have put this in the letter as well, that if
12 there are documents that discuss the patents that are in
13 suit in this case and that are not privileged and they value
14 the patents in some way, we'll give them to the defendants.

15 I have no problem doing that. In fact, throughout
16 this litigation, whenever we get document requests, we always
17 tell them we'll produce anything that is relevant or related
18 to the patents in suit in some way. I have no problem with
19 that.

20 What I think is going on here, however, is
21 the defendants want something beyond that. They want
22 negotiations that happened between third parties on things
23 that had nothing to do with the particular patents in this
24 case. That is frankly a fishing expedition, and we're
25 going to wind up producing every document relating to every

1 licensing transaction that ever took place at Nokia, if that
2 is where we're going.

3 So if we limit it to the patents in this case
4 and we limit it to the documents that actually discuss
5 those patents and place, potentially even place some value
6 on it, I'm happy to produce them. I'm not trying to figure
7 out whether they're relevant or not or whether they're
8 particularly probative or not. I'm not try to make that
9 distinction. I'm just trying to see do they mention the
10 patents in any way? And if they do, I'll give them.

11 THE COURT: All right. So, Mr. Kellman, just
12 to be clear on this, if there were a negotiation document
13 but it specifically referenced one of the patents in suit
14 and a potential thought about the value of that patent, you
15 would produce it; correct?

16 MR. KELLMAN: Right. If somebody generated a
17 document that said here is one of the patents in this case,
18 the '404 patent, and it is worth X, yes, we'll give that.
19 Absolutely. We look for the names of the patents all
20 throughout. That is part of the search terms that we look
21 for when we give that information. As long as it's not
22 privileged, obviously. Let me obviously put that caveat.
23 If it's part of a lawyer analysis or something like that,
24 obviously we'll withhold it but otherwise absolutely.

25 THE COURT: But you are not withholding anything

1 on the basis that that valuation is just simply too
2 speculative and probative value is just too little?

3 MR. KELLMAN: No, absolutely not.

4 THE COURT: All right. Move on to the second.

5 MR. KELLMAN: I'm agreeing with Your Honor. I
6 am sorry. I said that in the negative. I am agreeing with
7 you.

8 THE COURT: The transcript will be ambiguous,
9 but I understand you to agree. Go on to the second issue.

10 MR. KELLMAN: Sure. With respect to the laying
11 out damages theories, I thought it was actually telling
12 that HTC hasn't cited a case where someone lays out all the
13 damages analysis before expert reports. In the typical case
14 that I have been involved in, and I know Your Honor has done
15 this many, many, many times, most of the damages that is
16 done is part of expert reports.

17 Trying to cabin us in on a lost profits theory
18 at this point is premature because we don't know everything
19 from HTC yet. We don't have the full information regarding
20 market share. We don't have the full information regarding
21 their technical detail. We don't have the full information
22 regarding substitutes. It's still a work in process. We
23 have months left to go in discovery. And we can certainly
24 supplement over time but, right now, pinning us to a damages
25 theory, it's just premature.

1 THE COURT: But they're not requiring -- they're
2 not trying, as they say, to hold you to one or the other.
3 You'll be able to supplement as you learn more of that
4 information. And they're concerned, they say, that they
5 won't have a chance to develop a rebuttal case. Respond to
6 all of that, please.

7 MR. KELLMAN: Right. So I think what we're
8 talking about there, if I understand what the defendants are
9 framing here, is specifically with respect to lost profits.
10 That is what they discussed in their document.

11 We have not -- I don't believe we have withheld
12 discovery that they have asked of us regarding specific
13 products that they want to, if they want to discover that.
14 We're still in the process of evaluating that theory, and
15 we're happy to agree on a date to supplement rogs and
16 similar requests from us to them as well.

17 Trying to figure out what all the facts are
18 now to support a damages theory is premature as we're
19 just figuring out the infringement theories. We just had
20 infringement documents produced as of I think last week is
21 when they were supposed to be done.

22 So I'm happy to continue to supplement, but
23 I'm not aware of authority that requires me to lay out a
24 theory certainly not beyond lost profits and nothing is in
25 the letter that we have seen that requires that at this

1 stage.

2 THE COURT: All right. Thank you. Mr. Rassam,
3 briefly.

4 MR. RASSAM: Your Honor, very briefly.

5 Again, we're not asking for the theory. I'm
6 asking for the underlying facts. And I'm very surprised
7 that Mr. Kellman frankly says we're not withholding anything
8 that would show a lost profits analysis.

9 We've asked them for financials regarding their
10 own products so we can see where potential lost profits
11 analysis would go, and they have refused to produce that
12 material. So they're already withholding damages material
13 from us in terms of documents and they won't put the facts
14 in an interrogatory response. So we are completely
15 hamstrung in trying to develop our rebuttal theory, Your
16 Honor.

17 This is kind of a theme that is developing in
18 this case where Nokia is repeatedly dragging its feet in
19 providing us discovery. And, Your Honor, we're really
20 getting hamstrung. March 14th is not that far away. We
21 have got a lot of depositions to take, we have a lot of
22 depositions to defend, and we can't even get ready for the
23 depositions that are coming up in January.

24 So I disagree that Nokia has provided us the
25 relevant damages documents that we need, damages materials,

1 and they're also not giving us a lot of other materials,
2 Your Honor. It is really prejudice to HTC in terms of being
3 able to develop its case with the discovery close cutoff not
4 too far away, Your Honor.

5 THE COURT: Mr. Kellman, just briefly respond
6 because you're telling me you are providing all this stuff,
7 and I'm hearing you are not. So what do I do with that?

8 MR. KELLMAN: Your Honor, I think there is a bit
9 of confusion there as to -- and maybe we're talking about
10 two separate things, counsel and I are talking about two
11 separate things. What I think they're talking about is
12 specific interrogatories directed towards having us link a
13 product to a particular product.

14 If they ask us for financial information
15 regarding specific products, we haven't -- I don't think we
16 have, and if we have withheld that, I'm telling you now I
17 will give that.

18 So that, I don't think that that is the issue.
19 What I think the issue is, forcing us at this point to tie
20 particular theories to particular products and then tacking
21 that on to the damages. And that is just something that is
22 premature at this point.

23 THE COURT: All right. Mr. Rassam, is there any
24 response?

25 MR. RASSAM: Your Honor, just very briefly.

1 If they're going to do lost profits analysis,
2 it's tied to their own documents, their own materials, and
3 there is no reason not to give us the underlying facts now.

4 Mr. Kellman wanted authority. Well, Rule 26(c)
5 of the Federal Rules of Civil Procedure requires timely
6 supplementation of interrogatory responses.

7 I don't want to pin him down to a theory. I
8 understand he will write an expert report in April. I just
9 want the underlying facts right now, and he doesn't even
10 have to give all of them to me. Give me what you have now
11 and then supplement, but don't say in your letter brief that
12 you are going to supplement at some later date, because if
13 they end up supplementing this interrogatory two days before
14 the close of discovery, there is nothing I can do at that
15 point to develop my rebuttal case, Your Honor.

16 THE COURT: All right. Well, I'm denying the
17 relief that is sought here. I don't believe even in that
18 circumstance there is nothing you can do.

19 First off, with respect to the documents, the
20 plaintiff is representing repeatedly that they have already
21 provided valuation documents, to the extent that they're not
22 privileged, if they make any reference to any of the patents
23 in suit, and they represent that they have or would be willing
24 to produce other documents, for instance, the financials
25 that were discussed, so I don't see any basis for me to

1 order the plaintiff to produce more documents relating to
2 this last issue.

3 The broader or tougher I suppose issue is the
4 second one about whether, in a response to interrogatory,
5 the plaintiff should be required to supplement right now to
6 provide at least some of what they believe will ultimately
7 be their contentions relating to damages. And I, again, am
8 not persuaded that the plaintiff needs to supplement today
9 or in the very near future to provide the information the
10 defendants are looking for.

11 I believe time has been built into both of the
12 fact and expert discovery schedule to allow both sides to
13 flesh out all of the issues, including the damages issues;
14 and, very meaningfully, of course, there will be expert
15 discovery. There will be expert reports. The plaintiff
16 will have to put its whole damages case on the table in
17 connection at least with the expert discovery. And if the
18 defendants find that they think that the plaintiff has
19 waited too long or played other games in a way that is
20 unfairly prejudicial to the defendants, and I see the
21 defendants developing that theme through various comments
22 today, concerned that depositions may not be as productive
23 as they should otherwise be, well, I think it's pretty
24 clear from some of my rulings today and from the time we're
25 spending together today that if the defendants have a good

1 case to make that the plaintiff is in some ways not going
2 about discovery in the way that it should, you come back to
3 me and we will do what we can to ameliorate that prejudice
4 at that time. But just keeping my eye on the issues in
5 front of me today, the request for relief on this Issue
6 No. 4 by the defendants is denied.

7 I have just a couple minutes left. If the
8 plaintiff wants, we can talk about the issue raised in your
9 affirmative letter. It had to do with source code and
10 drawings. Is that something that the plaintiff wants a
11 ruling on? If so, go ahead.

12 MR. KELLMAN: Yes, Your Honor. Just very
13 briefly. This is Alan Kellman. I'm sorry.

14 The initial question regarding the CAD documents
15 I think has been resolved in regard with their response as
16 long as they're going to provide that at the end of the
17 month, so I think we're finally resolved. That's what we
18 wanted was a date certain on that.

19 With respect to just providing source code, the
20 only thing we're really asking for here is that we not have
21 to figure out what HTC had as far as source code or not.
22 There is a continuing theme here we ask for source code and
23 then something gets provided but it's not the complete set
24 and we have to try to figure on the what is missing. We
25 just want an order that HTC will now, at least by the end of

1 this month, if possible, to produce a full source code
2 computer with all the source code so we don't have to try to
3 figure out.

4 THE COURT: All right. HTC.

5 MR. RASSAM: Your Honor, well, it sounds as if
6 the computer automated design, the CAD file issue is
7 resolved, and we believe the other issue had been resolved
8 even prior to the scheduling of this call. But we are
9 producing the whole source code for commercial releases of
10 new products. We're not withholding anything. We're not
11 parsing anything out. In fact, when the plaintiff came to
12 us and said, hey, we think there is a bunch of stuff
13 missing, it turned out that most of it was in fact not
14 missing and was there.

15 To the extent there is anything else that is
16 not complete, we are reviewing and verifying our complete
17 production now. And by the end of the year, they will have,
18 if they don't already, they will have full commercial
19 releases of source code for every accused product.

20 THE COURT: Mr. Kellman, it sounds like you have
21 what you have asked for. Is that right?

22 MR. KELLMAN: It sounds like it. Let's see what
23 we get. Obviously, if there is an issue, as Your Honor has
24 already offered, we'll come back. Hopefully, we won't have
25 to.

1 THE COURT: Right, hopefully not. But it does
2 seem to me under the circumstances that both of the issues
3 raised by the plaintiff are at this point moot and/or unripe
4 and there is nothing for me to decide.

5 That covers all of the things that were on the
6 agenda for today. Thank you all very much for your time.
7 Good-bye.

8 (Telephone conference ends at 12:26 p.m.)
9

10 I hereby certify the foregoing is a true and accurate
11 transcript from my stenographic notes in the proceeding.

12 /s/ Brian P. Gaffigan
13 Official Court Reporter
14 U.S. District Court
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EXHIBIT 9



Acacia Introduces 800ZR and 800G ZR+ with Interoperable PCS in QSFP-DD and OSFP

By **Acacia** | Posted on March 21, 2024

Enables 800G Standards-Based Interconnects Between Data Centers in Metro and Regional Networks

With data center bandwidth growing rapidly, high-performance pluggable modules have become an important tool for network operators to scale their networks cost-efficiently. Acacia has worked closely with network operators to drive the industry's first interoperable Probabilistic Constellation Shaped (PCS) interfaces. Acacia's newest portfolio of silicon-based 800G coherent pluggables has been designed to double the connectivity speed from 400G to 800G to support data center interconnect (DCI) upgrades, taking advantage of next-generation routers with 800G I/O port speeds. When plugged into these routers, this family of 800G pluggables can replace traditional transport equipment across a greater range of infrastructure to meet demand for cloud and AI.

OIF Compliant 800ZR Modules

OIF compliant 400ZR has been a great success for the coherent pluggable industry with multiple suppliers and a tremendous volume of 400ZR QSFP-DD and OSFP modules deployed in metro DCI applications. With the switch and router 800G ports available, 800ZR will further reduce the cost, power, and space per 100G in the same applications. Acacia's 800ZR pluggables support QSFP-

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Acacia Delphi DSP-based coherent pluggable modules

800G ZR+ Modules with Interoperable PCS

Acacia's 800G ZR+ modules are designed to support the recently released OpenROADM specifications that include interoperable PCS transmission capability. The 131Gbaud PCS provides an additional OSNR margin at 800G for longer reach suitable for regional DCI applications, linking multiple fiber spans and in-line amplification between data centers. Acacia 800G ZR+ pluggables support QSFP-DD and OSFP form factors with >1dBm transmit output power.

"The success of ZR+ at 400G was largely driven by its performance and interoperability, which enabled a multi-source environment to emerge," said Scott Wilkinson, Lead Analyst for Optical Components at Signal AI. "The interoperability now being proposed with 800G – not only in short distance applications (800ZR), but also in long distance (800G ZR+) – expands the environment even further. Interoperable PCS will take the market for 800G pluggables beyond simple DCI into regional and even long-haul networks."



include 400G QPSK and PCS with various baud rates to fit into different ROADMs optical line systems. It is capable of >1dBm transmit power and high transmit OSNR over the entire C-band thanks to the integrated tunable optical filter for amplified spontaneous emission reduction.

Backed by Industry Leading Coherent Technology

Both the 800G pluggable portfolio and 400G ultra long haul pluggable are powered by Delphi, Acacia's 9th generation Digital Signal Processor (DSP) ASIC. Acacia boasts the broadest field-proven 400G MSA coherent pluggable portfolio in the industry with more than 250,000 ports shipped based on the Greylock DSP, including more than 10,000 **Bright 400ZR+** ports. Acacia's 800G and 400G pluggable portfolios benefit from Acacia's 3D Siliconization approach, which applies integration and 3D stacking techniques to enable a single packaged device that includes all the high-speed optoelectronic functions necessary for coherent communications to provide benefits in cost, reliability, power, and size. These devices are manufactured using standard electronics packaging processes and result in improved signal integrity and performance through the reduction of electrical interconnects.

The Delphi DSP-based pluggable modules are planned to be available beginning in Q2 CY2024.

Additional Resources:

Blog: **Key Challenges and Requirements for 800G MSA Pluggables**

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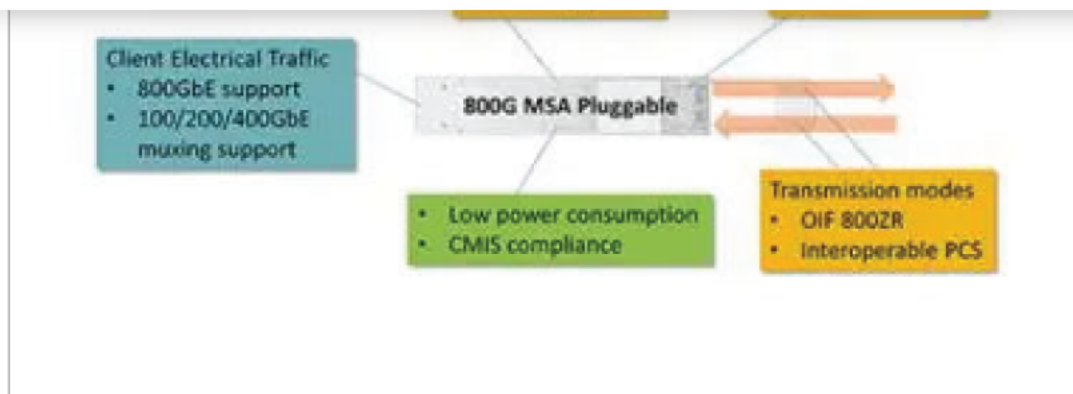
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EXHIBIT 10



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VIA ELECTRONIC MAIL

September 13, 2023

Holly Engelmann
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Email: hengelmann@duanemorris.com

Re: *Cisco Systems, Inc. and Acacia Communications, Inc. v. Ramot at Tel Aviv University Ltd.*
Case Nos. 21-cv-01365-GBW-CJB, 22-cv-674-GBW-CJB

Dear Counsel:

I write regarding deficiencies in Cisco's document production and in this case to date. I previously wrote regarding deficiencies in Cisco's and Acacia's (collectively "your" or "Cisco's") document production and responses in this case—including via email on April 10, 2023—and we have discussed some of these matters in conferences. While some of the few dozen documents you produced in April were highly relevant, those documents themselves demonstrate that there are large numbers of additional relevant and responsive technical documents remaining unproduced.

I also note that some of these issues with Cisco's discovery persist from the stayed prior Eastern District of Texas case. As you will recall, Ramot filed a Motion to Compel in that case on July 6, 2020—seeking, *inter alia*, documents showing firmware configuration of the accused modules, technical information about certain then-new products, as well as technical information about certain then-new products, as well as technical information about Acacia's transmit DSP functionality.

Cisco and Acacia's failure to produce these materials and provide complete responses has prejudiced Ramot in preparing its case. Now as in the prior E.D. Texas case, Cisco is seeking to force Ramot into a last-minute rush to take depositions on an incomplete record. Please immediately advise as to times this week that we may confer and identify those issues for which Ramot must move to compel.

Cisco's and Acacia's Productions and Interrogatory Responses are Deficient

1. Improper unilateral redefinition of "Accused Products"

Just as in the prior litigation, in its responses Cisco has improperly and unilaterally redefined "Accused Products" to exclude chassis, line card, and switch products that utilize pluggable slots for infringing transceiver modules—and has refused to provide interrogatory responses, complete technical documentation, and sales and cost data, for those Accused Products.

The objected-to products are designed to use—and in some cases exclusively designed for the use of—accused pluggable transceiver modules. They are also marketed with, and sold in bundles with, accused pluggable transceiver modules. In the prior litigation, the parties extensively discussed this issue. Also in the prior litigation, Cisco ultimately provided sales figures for such products accused there, which were used and debated by experts in their reports. Cisco cannot possibly deny the relevance of information about the marketing and sales (bundled, conveyed, or otherwise) of these products.

Yet Cisco has not provided sales, cost, or bundling information for the chassis, pluggable line card, and switch products and time-period at issue here. This failure, along with others discussed herein, prevents Ramot from effectively deposing Cisco about its (incomplete) financial information.

2. Missing Accused Products

The following products are Accused Products according to the definitions and/or model number identifications in Ramot's counterclaim, disclosure of asserted patents, accused products, and damages model, and preliminary infringement contentions. Cisco has either refused or failed to include these products in its interrogatory responses and has not produced core technical documents with respect to these products:

CIM8-C-K9, CIM8-L-K9 / CIM-8
DP01QSDD-ZF1 / QDD-100G-ZR-S
DP04QSDD-HE0, DP04QSDD-HK9, DP01QSDD-LK9 / QSFP-DD-400G (Bright)
DP04CFP2-D15 / 400G CFP2 DCO BiDi
DP04SFP8
SFP-50G-SL
SFP-50G-SR-S
SFP-50G-LR-S
QDD-8X100G-FR
QDD-2X400G-FR4

In addition, the gross revenue information Cisco has produced in this case lacks data for at least the following Accused Products (in addition to all of those chassis, pluggable line card, and switch products mentioned in Section 1. above):

CIM8-C-K9
CIM8-L-K9
DP04CFP2-D15

DP04QSDD-HE0, DP04QSDD-HK9, DP04QSDD-LK9
QSFP-100G-SR1.2
QDD-400G-SR4.2-BD
QDD-8X100G-FR
QDD-2X400G-FR4
NCS1K4-QXP-K9
NCS1K4-QXP-L-K9
NCS1K4-2.4T-K9

If you contend that any of these products are missing or excluded because there have been no “general” sales, please identify those products in your responses. Also, this would not be a valid objection as our discovery requests cover qualification, sampling, and other “pre-sale” delivery and sales to customers. Information about use by Cisco and its customers, as well as technical information about these products, is indisputably relevant—and largely or completely missing from Cisco’s responses and productions.

3. [REDACTED]

[REDACTED]

4. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. Missing identification of components and production re: OEM modules

Ramot's Interrogatory No. 7 asked for the identification of DSP and other components within Cisco's transceiver modules. Cisco failed to do so with respect to modules "sourced from third parties." But Cisco has this information in its possession, and its failure to provide it has substantially prejudiced Ramot, forcing and then delaying effective subpoena discovery of Cisco's OEMs, who have objected that they also need component identification in order to respond.

Ramot also sought technical information from Cisco about Each Accused Product, including: Engineering specifications and design documents (RFP Nos. 3, 7, 10); Schematics, block diagrams, etc. (RFP No. 4); Bill of Materials or other documents to show the components (and their costs) included in each Accused Product (RFP No. 6). Cisco's production of these materials has been inadequate, particularly with respect to modules "sourced from third parties," which include those designed by, or with input from, Cisco.

And particularly relevant for modules "sourced from third parties," Ramot requested Cisco produce, from its possession, customer documentation, *e.g.*, datasheets, device specifications, design guidelines, programming or configuration guides, application notes, and whitepapers (RFP No. 11). Cisco has not done so, forcing Ramot to seek via subpoena documents that Cisco's third-party OEMs provide their customers like Cisco in the ordinary course and here.

This obstruction has prejudiced Ramot's ability to complete discovery. For example, the lack of documents from Cisco detailing the components and operation of modules built by OEMs has prevented Ramot from mitigating Cisco's failure in interrogatory responses to identify such components and detail such operation.

Cisco's failure to identify components and provide complete technical discovery, including for OEM products, has delayed discovery, has impeded Ramot in third-party discovery, and prevents Ramot from effectively deposing Cisco's technical witnesses about the Accused Products.

5. Incomplete production re: Acacia components

The few customer specifications and programming guides produced in this case for certain of the Acacia DSP products contain lists of other relevant documents, many of which are obviously relevant and responsive to Ramot's requests, but are not included in the production. And similar customer specifications and programming guides appear to be missing for other of Acacia's DSP chips. A complete list of this material is outside the scope of this letter and not Ramot's responsibility to compile, but examples can be provided to assist Cisco's discovery compliance.

Also, Cisco's April production included, for the first time in four years of litigation, a handful of engineering specifications for

[REDACTED]

These documents are highly relevant to Ramot's allegations of infringement, and

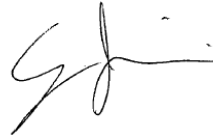
their sparse selection and late production demonstrates that Cisco's search for and production of non-public technical materials remains manifestly incomplete.

* * *

Ramot has already been prejudiced by Cisco and Acacia's failure to timely produce these materials, and additional delay will compound this prejudice.

Accordingly, please immediately remedy the deficiencies identified herein, let us know a date certain by when you will do so, or identify times when you can be available to meet and confer about these issues. We are available to answer any questions you may have or to otherwise confer about the above.

Regards,

A handwritten signature in black ink, appearing to read 'CJ', with a horizontal line extending to the right.

Corey Johanningmeier

cc: All Counsel of Record

EXHIBIT 11

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October 6, 2023

VIA E-MAIL

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**Re: Cisco Sys., Inc. and Acacia Comms., Inc. v. Ramot at Tel Aviv Univ. Ltd.,
Case Nos. 1:21-cv-01365-GBW and 1:22-cv-00674-GBW (D.D.E.)**

Dear Corey:

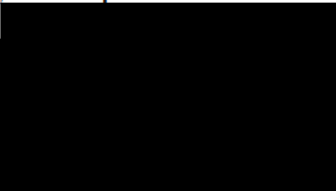
I write in response to your letter dated September 13, 2023.

As an initial matter, Cisco and Acacia have not “prejudiced Ramot in preparing its case” and our offer to extend the Fact Discovery deadline by a week was in no way intended to force Ramot “into a last-minute rush to take depositions on an incomplete record.” As you note in your letter, the litigation between the parties has spanned many years, with the current actions filed more than two years ago (September 28, 2021), with additional cases added eight months later (May 24, 2022). The current Scheduling Orders were entered over a year ago (September 8, 2022) and provided for disclosures to be made on September 14, 2022, Cisco’s production of core technical documents on October 14, 2022, and discovery following thereafter until the September 29, 2023 deadline. As required, Cisco and Acacia served its Initial Disclosures on September 14, 2022, served interrogatories and RFPs on September 28, 2022, and produced core technical documents on October 14, 2022. Five months later on February 15, 2023, Ramot served interrogatories and RFPs, to which Cisco and Acacia responded and objected on April 21, 2023. Only as the September 29, 2023 fact discovery deadline loomed did Ramot serve 30(b)(6) deposition notices (August 15, 2023), third-party subpoenas (August 22, 2023), 30(b)(1) deposition notices (August 24, 2023), additional third-party subpoenas (August 29, 2023), and a second set of interrogatories (August 29, 2023). To blame Cisco and Acacia for a “last-minute rush” is belied by this timeline.

Duane Morris

Corey Johanningmeier
October 6, 2023
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For documentary purposes, I note that since your September 13 letter and before this response, the parties filed a stipulation staying all discovery (other than third-party document discovery) until after the issuance of the Final Written Decision in the '872 Patent *inter partes* reviews. 1:21-cv-01365-GBW, Dkt. 87, 1:22-cv-00674-GBW, Dkt. 77 (Sept. 20, 2023). The Court ordered the stay on September 21, 2023. No new discovery can be served, but should the stay be lifted the parties can seek responses, documents, and depositions for discovery already served.

Regarding your reference to Ramot's Motion to Compel in the Eastern District of Texas Case (*Ramot at Tel Aviv Univ. Ltd. v. Cisco Sys., Inc.*, Case No. 2:19-cv-00225-JRG) both parties filed motions to compel: Cisco filed a motion on July 3, 2020 (Dkt. 93); and Ramot filed a motion on July 6, 2020 (Dkt. 96). Cisco's motion sought documents relating to the prosecution of the patents-in-suit and/or patents related by priority to the patents-in-suit. 

The parties filed responses (Dkt. Nos. 101 and 104 respectively), but the Court did not hear argument or issue a ruling before staying the case pending resolution of ex parte reexaminations (Dkt. 235). So to your point, it appears both parties have issues that persist from the EDTX Matter.

Turning to your specific complaints.

1. Ramot's Allegation that Cisco Improperly Redefined "Accused Products"

In its February 15, 2023 discovery requests, Ramot defined "Accused Products" so broadly as to encompass Cisco routers, switches, and optical transport systems, regardless of whether those products have been accused of infringement and could possibly be accused of infringement; and regardless of whether those products are sold separately as part of a Modular system (e.g., 9000 Series and 8800 Routers), are integrated and sold together with other components of a Fixed Chassis system (e.g., 8100 and 8200 Routers), or are themselves the substantially complete functional instrumentality of a complete system (e.g., certain Nexus 3000 Series or Nexus 9300 Series GX and GX2 switches). The patents in suit relate to a laser modulator and thus, Cisco's and Acacia's discovery responses identified the specific optical transceiver modules identified in Ramot's definition and further identified by product name or model number in Ramot's preliminary infringement contentions served on December 16, 2022 those products that (1) included optical modulators and operate at speeds at or above 100G, and (2) routers, switches, or line cards that include the transmit DSP functionality that Ramot accuses of infringement. In total we identified over a hundred products by description and ID number. Moreover, limiting discovery to the actual accused products for which Ramot has provided Cisco and Acacia with infringement claim charts is proper.

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Chassis, pluggable line cards, router and switch products that do not contain optical modulators are not within the proper scope of discovery in this case. Given that these are apparatus claims that are all directed exclusively to an optical modulator, and given that the claim elements all recite the details of the claimed optical modulator, Ramot cannot in good faith accuse products that do not even have an optical modulator. If you actually are doing so, please let us know, and please provide a chart specific to any such product, including an explanation of how claim elements directed exclusively to an optical modulator could be infringed by a product without an optical modulator.

2. “Missing Accused Products.”

You allege that technical information about certain products has not been produced. Cisco and Acacia disagree with your characterization, and refer you to Cisco’s and Acacia’s responses to Ramot’s Interrogatory No. 1, which identifies specific technical documents, and Interrogatory No. 5. Cisco and Acacia further note that the products you identify were not identified in Ramot’s preliminary infringement contentions. Cisco and Acacia do not have an obligation to identify accused products for Ramot, particularly where the products are publicly available. *See, e.g., Honeywell Int’l Inc. v. Audiovox Commc’ns Corp.*, C.A. No. 04-1337-KAJ, 2005 WL 3988905, at *1 n.2 (D. Del. Oct. 7, 2005); *Invensas Corp. v. Renesas Elecs. Corp.*, 287 F.R.D. 273, 286 (D. Del. 2012). Nevertheless, in the spirit of compromise, to the extent such products have been released or are expected to be released by opening expert reports in these cases and to the extent such products contain either transmit DSP functionality and/or optical modulators, Cisco and Acacia will supplement their Interrogatory responses to identify such products and produce additional relevant documents should the stay be lifted.

3. [REDACTED]

4. [REDACTED]

Duane Morris

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5. “Missing identification of components and production re: OEM Modules.”

In response to Interrogatory 7, we identified the OEMs for each pluggable, noting by Product ID the third-party supplier. [REDACTED]

[REDACTED] These third-parties supply the modules and components and thus, have technical information (e.g., datasheets, device specifications, engineering specifications, design documents and guidelines, schematics, block diagrams, programming or configuration guides, application notes, whitepapers) responsive to Ramot’s discovery requests that Cisco and Acacia do not have. Having to seek that information from the third-parties who generate and maintain the documentation Ramot seeks is not prejudicial, but a normal and ordinary course of litigation. Ramot served subpoenas on many of the identified third-parties and Cisco and Acacia expect Ramot to obtain information from those sources.

6. “Incomplete production re: Acacia components.”

Production of “highly relevant” documents does not demonstrate that “there are large numbers of additional relevant and responsive technical documents remaining unproduced,” nor is it evidence that Cisco’s and Acacia’s productions have been “manifestly incomplete.” Production of documents five months before the close of fact discovery is anything but late, particularly where Cisco and Acacia fully complied with the substantial document completion deadline in the scheduling order. Likewise, Ramot’s complaints about receiving Acacia specifications in the current litigation ignore the fact that while Acacia is a party to the current Delaware litigation, Acacia is a non-party in the EDTX Matter from whom Ramot sought documentation via subpoena, and from whom Ramot did not move to compel any documents or information Ramot thought missing in the EDTX Matter. You state that Ramot can provide examples of what it seeks to assist in a document search. We welcome such assistance and look forward to receiving a list.

* * *

Please let me know if you have any questions. If you wish to meet and confer concerning each side’s discovery letters, we are amenable. Please propose a time and we can set something up. Thank you.

Sincerely

/s/ Holly Engelmann

Holly Engelmann